

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff,	:
	:
v.	:
	: Civil No. 07-CV-11275 (JGK/JCF)
	:
	:
DARRYL A. GOLDSTEIN and	:
CHRISTOPHER L. O'DONNELL,	:
	:
Defendants.	:
-----X	:

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
CHRISTOPHER L. O'DONNELL'S MOTION TO DISMISS THE COMPLAINT**

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### **INTRODUCTION**

The SEC's Opposition to Defendant O'Donnell's Motion to Dismiss ("Opposition") relies on broad generalizations and suffers from the same defects as the Complaint. Rather than directly addressing O'Donnell's challenges to the adequacy of the Complaint, including its lack of specific factual allegations and reliance on unreasonable inferences, the SEC argues that the motion is "unsupported" or beyond the scope of a proper motion to dismiss. Opposition at 3-4. In fact, O'Donnell's motion is well grounded and fits within the familiar confines of Rule 12(b)(6).

The SEC incorrectly claims that it need not plead fraud with particularity like any other plaintiff or plead facts demonstrating a "strong inference" of scienter. It therefore invites this Court to relax the pleading requirements and find that, because this case is supposedly in its opening stages, the SEC should be allowed to proceed on the premise that its pleadings reflect the tip of an allegedly fraudulent iceberg.

The SEC is not the typical plaintiff. It should not be allowed deference in this civil enforcement proceeding because it has not yet had the benefits of discovery under the Federal Rules of Civil Procedure. Although the Complaint was filed on December 12, 2007, the SEC has engaged in plenary, one-sided discovery surrounding O'Donnell's conduct for more than four years. *See In the Matter of Certain Mutual Fund Trading Practices*, Order Directing Private Investigation and Designation of Officers to Take Testimony (Sep. 10, 2003), copy attached as Exh. 1. The SEC's extensive investigation—supported by its subpoena power—included: (1) sworn testimony from numerous witnesses, including O'Donnell, his assistants, and countless other Morgan Stanley personnel, (2) substantial volumes of Morgan Stanley and third party e-mails and trading records, and (3) documents and recordings from third parties, including

Millennium. Further, the SEC has obtained documents and information from the mutual funds referenced in the Complaint—the alleged victims.

Yet, the SEC’s Complaint contains little more than generalized, vague allegations without the basic facts necessary to inform O’Donnell which of his many lawful activities allegedly constituted fraud. Indeed, the inadequacy of the Complaint—following over four years of pre-litigation discovery—suggests that the SEC may never be able to meet its burden of pleading an adequate, factual record to support fraud allegations against O’Donnell.

### **ARGUMENT**

#### **I. The SEC Misstates Applicable Pleading Requirements**

##### **A. The SEC is required to plead fraud with particularity**

Rule 9(b) requires that the SEC, like every plaintiff, plead its fraud claims with particularity. *See ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007); *SEC v. Collins & Aikman Corp.*, 524 F. Supp. 2d 477, 484 (S.D.N.Y. 2007). The Second Circuit has held that Rule 9(b) “is *applied assiduously* to securities fraud” as a “strict pleading requirement.” *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 168 (2d Cir. 2005) (emphasis added). Indeed, when the SEC argued entitlement to a lesser standard in another case, that court noted “[t]he defendants respond that the SEC’s arguments are ‘preposterous’ and, although the description is a bit overblown, this Court, in essence, concurs.” *SEC v. Tambone*, 417 F. Supp. 2d 127, 131 (D. Mass. 2006).

Further, the cases the SEC relies upon for the proposition that it need only plead generalized facts and may then rely on inferences do not stand for that at all. Instead, they merely state that Rule 9(b) does not require a plaintiff to detail each and every fact underlying its claims. *See* Opposition at 13, (citing *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001); *In re Tower Auto. Sec. Litig.*, 483 F. Supp. 2d 327, 335 (S.D.N.Y. 2007)).

Not requiring every factual detail is very different from allowing a complaint with only general and conclusory allegations to survive. Indeed, the Second Circuit has repeatedly rejected complaints alleging securities fraud where they contain insufficient, unparticularized pleadings. *ATSI Commc'ns, Inc.*, 493 F.3d at 103; *Rombach v. Chang*, 355 F.3d 164, 172 (2d Cir. 2004); *Kramer v. Time Warner Inc.*, 937 F.2d 767, 775 (2d Cir. 1991); *Ouaknine v. MacFarlane*, 897 F.2d 75, 80 (2d Cir. 1990). In *Rombach*, for example, even though the complaint “catalog[ed] a number of [allegedly fraudulent] statements made by” the defendants, the Second Circuit found that it failed to allege fraud with particularity because it failed to “explain[] with adequate specificity how those statements were actually false or misleading.” 355 F.3d at 172.

The SEC is not entitled to a relaxed pleading standard for any other reason that courts sometimes allow. Contrary to plaintiff's assertion, this is not a case where “the details of a fraudulent scheme may only be known by the defendants.” Opposition 14. Indeed, in *Tambone*, the court explicitly rejected such an argument where, as here, the SEC had undertaken an extensive investigation prior to filing its complaint. 417 F. Supp. 2d at 131. The SEC has not and cannot allege that the factual details here are under O'Donnell's control, nor have they met the applicable standards for pleadings based on “information and belief.” See *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). In short, the SEC offers no support for its claimed entitlement to a relaxed pleading standard.

Alternatively, the SEC skirts O'Donnell's challenge, and declares that its Complaint satisfies Rule 9(b) because its claims are “supported by detailed factual allegations, comprehensive charts, and specific examples.” Opposition at 1. However, O'Donnell's motion demonstrates that those factual allegations lack specificity and the “examples” cited fail to support the conclusory allegations or a reasonable inference that O'Donnell engaged in other “fraudulent” conduct. See O'Donnell Memorandum, 7-12. In sum, it is not enough for the SEC

to summarily allege “deception” on one or a handful of occasions, and then ask this Court to infer that the story was the same on hundreds of others.

The SEC also invites this Court to uphold the Complaint because other courts have “denied motions to dismiss where similar market-timing schemes” were alleged. Opposition at 7. However, other than the same underlying subject matter, the SEC has offered no reason why the courts’ decisions in those four cases should have any bearing on this Court’s decision.<sup>1</sup> While *In re Mutual Funds Investment Litigation*, 384 F. Supp. 2d 845, 862 (D. Md. 2005), addressed only private fraud claims, and so is of limited applicability, that court dismissed claims against two of the broker-dealer defendants involved in market timing. *Id.* at 858-60. In upholding the claims against the other broker defendants, that court recognized that those brokers allegedly did more than “merely assist in facilitating . . . market timing transactions” and instead “participated in *initiating, instigating, and orchestrating* the [market timing] scheme.” *Id.* at 862. (emphasis added). The line between basic brokerage services, *e.g.*, order entry, and substantive participation in a fraudulent scheme is thus a significant one.

Aside from the general allegation that O’Donnell “advised [his customer] on how to make deceptive market-timing trades,” Compl. ¶ 3, the SEC does not make a single allegation that O’Donnell ever instructed or advised Millennium in any way on whether or how to open any accounts or trade, for example. Despite exhaustive investigation, the SEC cannot point to a single e-mail, telephone call, instant message, facsimile or other communication from O’Donnell instructing Millennium on what to do or how to do it. Ultimately, the only attempt made in the Complaint related to any advice provided to Millennium at all is the previously discredited reference in Compl. ¶ 51 to one e-mail sent by O’Donnell’s assistant. The SEC still does not

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<sup>1</sup> Interestingly, in two of the four cases, complaints were dismissed against certain brokers. *See, e.g., In re Mutual Funds Investment Litigation*, 384 F. Supp. 2d 845, 862 (D. Md. 2005); *SEC v. Druffner et al*, No. 1:03-cv-12154-

explain why that alleged statement should be attributed to O'Donnell or how it is evidence of fraud or deception. *See* O'Donnell Memorandum at 11. By its failure to respond, the SEC has abandoned the Complaint's claims with respect to that e-mail, and leaves nothing in its place.

**B. The SEC is bound by the Second Circuit's strong inference standard**

The SEC's assertion that it need not plead a "strong inference" of scienter, *see* Opposition 16-18 & nn.4-6, is contrary to Second Circuit case law.<sup>2</sup> "The strong inference requirement for pleading scienter . . . applies to all actions brought in [the Second] Circuit that are governed by Rule 9(b)." *Collins & Aikman Corp.*, 524 F. Supp. 2d at 487.

Further, the Second Circuit has held that the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(2), codified the same "strong inference" standard that it applies under Rule 9(b). *Novak v Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000).

Thus, when the Supreme Court interpreted the meaning of "strong inference" in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504-2505 (2007), it necessarily provided a highly relevant and instructive, if not strictly binding, interpretation of that phrase under the Second Circuit's Rule 9(b) standard.<sup>3</sup> Although the Second Circuit has not ruled on the issue in the few months since *Tellabs* was decided, other courts have unsurprisingly applied the "strong inference" standard articulated in *Tellabs* to fraud actions brought by the SEC. *See SEC v. Goldsworthy*, No. 06-10012-JGD, 2007 WL 4730345, at \*15 (D. Mass. Dec. 4, 2007); *SEC v. Boling*, No. 06-1329 (RMC), 2007 WL 2059744, at \*6 (D.D.C. Jul. 13, 2007).

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NMG (D. Mass. Jun. 14, 2004) (oral order dismissing the SEC's first complaint for failure to plead with particularity required by Rule 9(b)). An except of the docket sheet reflecting the dismissal is attached as Exh. 2.

<sup>2</sup> Despite this broad assertion, and perhaps in recognition of its weakness, the SEC ultimately concedes that it "need only set forth specific facts that give rise to a reasonable and *strong inference* of O'Donnell's fraudulent behavior." Opposition 24-25 (emphasis added).

<sup>3</sup> Contrary to the SEC's implication, Opposition at 16-18 & n. 4, O'Donnell does not suggest that the PSLRA itself applies to the SEC. Instead, O'Donnell's position is that "even though the PSLRA does not apply to actions brought by the SEC, the SEC is subject to Rule 9(b) and must therefore plead a 'strong inference' of scienter." *SEC v. Collins & Aikman Corp.*, 524 F. Supp. 2d 477, 487-88 (S.D.N.Y. 2007).

The SEC's separate assertion that its governmental status should somehow alter this analysis to allow for a lower pleading standard, Opposition 18 & n.5, is unprecedented. The Opposition does not contain a single case to support the proposition that the *Tellabs* interpretation of "strong inference" does not apply to the SEC in this case. There is all the more reason to apply the "strong inference" standard where the plaintiff is a federal agency with subpoena power that has pursued over four years of pre-litigation discovery.

The Opposition also does not cure the Complaint's failure to allege that O'Donnell had a financial motive to engage in fraudulent trading. Although the SEC alleges that O'Donnell "earned approximately \$390,677 from placing market-timing trades for Millennium," Compl. ¶ 62, the Complaint has not alleged any link between the asset-based fees O'Donnell received as a result of his relationship with Millennium and the volume of Millennium's trades. In fact, the SEC has not alleged that O'Donnell had any incentive to increase trading volume.

This is in sharp contrast to the numerous cases, some of which were cited by the SEC, Opposition at 20-21 & n.8, where brokers received commissions (or investment banks received fees) that are part and parcel of the allegedly fraudulent transactions themselves. Here, because the SEC has not alleged any link between O'Donnell's compensation and the allegedly fraudulent trades, it has not alleged any particularized financial motive for O'Donnell to engage in the fraud. *See Kalnit v. Eichler*, 264 F.3d 131, 139 (2nd Cir. 2001).

## **II. The SEC Has Not Addressed The Complaint's Insufficiencies**

### **A. Plaintiff's criticism of O'Donnell's attack on the factual adequacy of the Complaint is without merit**

The SEC persists in its "kitchen-sink" approach that sheer numbers are enough to support a fraud claim. Millennium may have engaged in a fair amount of trading and O'Donnell may



have used as many as three FA numbers, but there is nothing inherently fraudulent or even abnormal about such activity.

As for the Complaint's lack of particularity, the SEC's response is mere repetition. Yet, regardless of how many times they are repeated, the SEC's generalized allegations do not pass muster. Repeated recitation of a laundry list of generalized allegations does not make them any more specific. See *Rombach*, 355 F.3d at 172. Further, the SEC side-steps the defects detailed in the memorandum supporting O'Donnell's motion, including that the alleged number of problematic trades is grossly inflated and that the SEC's inferences are contradicted by their own Complaint.

O'Donnell's challenges are not beyond the scope of a Rule 12(b)(6) motion. Opposition at 3-4. In fact, it is well-settled that this Court, in testing the sufficiency of a fraud complaint, need only credit reasonable inferences (*In re NYSE Specialists Securities Litig.*, 503 F.3d 89, 95 (2d Cir. 2007)), is not bound to accept contradictory allegations, O'Donnell Memorandum at 8 (citing *In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d 574, 585 (S.D.N.Y. 2007)), and may consider facts integral to the Complaint or in plaintiff's possession upon which it has relied, O'Donnell Memorandum at 16 n.12 (citing *In re Merrill Lynch & Co., Inc.*, 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003)).

**B. The SEC overstates the significance of mutual fund communications**

The SEC attempts to attach significance to the number of communications O'Donnell allegedly received from mutual fund companies that it refers to as "block notices." In its Opposition, the SEC increases reliance on the negative inferences it requires the Court to draw from the 94 such communications. Compl. ¶ 59; Opposition at 12 and 24. In addition to the problems previously identified, O'Donnell Memorandum at 7-8, 17-18, the SEC's Opposition presents another significant problem. The SEC attempts to collapse all of the mutual fund

families that Millennium traded with into one homogenous entity simply known collectively as “the mutual funds.” Yet, each mutual fund is a distinct legal entity with its own trading tolerances, policies and procedures. It is patently unreasonable to imply that communication from one provided any guidance concerning the tolerances, policies or practices of another. Thus, there is no basis for the SEC’s attempted reliance on the “cumulative impact” of all such communications.

**C. Plaintiff has alleged nothing improper about Millenium’s trading in variable annuities**

The Complaint alleges that O’Donnell purchased variable annuities “[i]n an effort to further disguise [his client’s] market-timing activities.” Compl. ¶ 57. Aside from the fact that all of Millennium’s trades were unsolicited, this allegation fails to (a) identify which contracts are allegedly “deceptive,” (b) articulate why they are “deceptive,” or (c) explain how O’Donnell is allegedly responsible for any such deception. *Cf.* O’Donnell Memorandum at 14. Rather than address these factual inadequacies, the SEC merely repeats its hollow refrain that Millennium supposedly “did not need or want life insurance, nor was it interested in tax-deferred investing or retirement planning benefits.” Opposition at 24. Yet, the SEC has never alleged—much less offered any support for—why these are the only permissible uses for variable annuities and why all others are *per se* fraudulent. For example, the SEC has never alleged any facts to support its claim that Millennium, unlike countless other employers, would have no interest in providing retirement benefits to its employees.

**D. The SEC has not alleged any affirmative misrepresentation by O’Donnell**

The Complaint does not allege a single affirmative misrepresentation or actionable omission by O’Donnell to a mutual fund. O’Donnell Memorandum at 4. The SEC simply ducks this challenge. *See* Opposition at 15.

Rather than plead the facts related to one or more direct, affirmative misrepresentations, for example, in an e-mail, a telephone call, a facsimile, or some other communication, the SEC theorizes that O'Donnell "made false and misleading statements to mutual fund companies in the account opening process," Opposition 8 (citing to Compl. ¶¶1, 3, & 4), and "concerning his use of multiple accounts and FA identification numbers—when executing trades for Millennium." Opposition 7-8.

These general accusations cannot withstand scrutiny. *See* O'Donnell Memorandum at 5-12. Further, the SEC has not explained how internal Morgan Stanley account opening documents could be construed as "statements" to a mutual fund company. There is no allegation that these documents were ever intended to be, or actually were, shared with any mutual fund company. The mere opening of accounts at Morgan Stanley cannot, without more, be a "statement" to a mutual fund company.

In sum, absence of any particularized factual allegations, especially given the extensive factual record the SEC has already developed, precludes this Court from drawing the inference of deception necessary to salvage the Complaint. *See* O'Donnell Memorandum at 7-8.<sup>4</sup>

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<sup>4</sup> Indeed, it is disappointing that the SEC feigns ignorance as to highly relevant facts that contradict its fraud allegations. O'Donnell continues to press this motion under Rule 12(b)(6) and not, as the SEC suggests, under Rule 56. Further, and in light of the SEC's extensive investigation, O'Donnell requests that the Court dismiss this case with prejudice and not grant the SEC leave to amend its complaint. But if the Court were to give the SEC an opportunity to replead, the SEC should be required to plead a complaint that is consistent with the facts developed in the lengthy investigation.

For example, the SEC has obtained sworn testimony from O'Donnell, his assistants, and countless other Morgan Stanley personnel, including his former Branch manager and direct supervisor at the time, Salvatore Samperi. (Mr. Samperi possess an MBA in Finance from New York University, and entered the brokerage business after a distinguished 30 year career with the Port Authority of New York and New Jersey Police Department, retiring from the rank of Deputy Director in 1995. *See* Samperi Testimony 12:15-14:12 (Exh. 4E).) Yet, none one of these key witnesses testified that O'Donnell ever provided untruthful information to a mutual fund company.

To the contrary, O'Donnell and Mr. Samperi, testified that they personally (1) obtained approval for Millennium's trading from senior Morgan Stanley compliance, operations, and senior management (*see, e.g.,* O'Donnell Testimony 27:22-28:17, 64:25-65:13, 166:21-167:22 (Exh. 3A); Samperi Testimony 149:21-150:7, 204:21-204:25, 206:11-208:21, 214:5-217:3, 257:5-258:12 (Exh. 4A)); (2) discussed Millennium's trading with mutual fund employees in order to understand and comply with market-timing rules (*see, e.g.,* O'Donnell Testimony 137:23-142:1, 122:13-123:2 (Exh. 3B); Samperi Testimony, 85:19-86:21, 121:20-122:8, 142:11-143:3 (Exh. 4B)); and (3) discussed

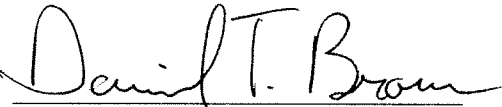
**CONCLUSION**

For the foregoing reasons, and for the reasons articulated our opening memorandum, the Complaint should be dismissed in its entirety as to Mr. O'Donnell with prejudice.

Dated: April 24, 2008

Respectfully submitted,

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Millennium's variable annuities trading with Morgan Stanley and insurance company employees (*see, e.g.*, O'Donnell Testimony, 163:24-166:19 (Exh. 3C); Samperi Testimony, 190:4-192:20 (Exh. 4C)). In addition, Millennium's accounts were all internally linked, (*see* O'Donnell Testimony 83:7-85:1 (Exh. 3D)), thus allowing Morgan Stanley personnel to easily identify them as related. Indeed, mutual funds had no trouble identifying O'Donnell or his client's trading and were able to stop any activities they chose (*see* Samperi Testimony, 129:20-135:12; 143:16-145:21 (Exh. 4D)).

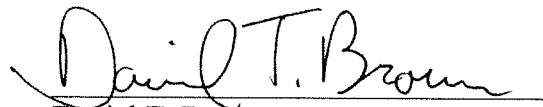
Further, Samperi's testimony on these matters is supported by his detailed, contemporaneous notes. Copies of relevant handwritten notes are included in Exh. 5. (As an aid to the Court, we attach as Exh. 6 a typed transcription of those notes prepared by a Mayer Brown LLP employee.)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24<sup>th</sup> day of April 2008, a true and complete copy of the foregoing Reply Memorandum in Support of Defendant Christopher L. O'Donnell's Motion to Dismiss the Complaint was served by ECF to counsel of record and by first-class mail, postage pre-paid on the following:

Christopher R. Conte, Esquire  
Mark J. Kreitman, Esquire  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Robert S. Blackburn, Esquire  
U.S. Securities and Exchange Commission  
3 World Financial Center  
Room 4300  
New York, NY 10281

A handwritten signature in black ink, reading "Daniel T. Brown", written over a horizontal line.

Daniel T. Brown  
Mayer Brown LLP  
1909 K Street, N.W.  
Washington, DC 20006  
(202) 263-3000

# **Exhibit**

# **1**

# ORDER DIRECTING PRIVATE INVESTIGATION AND DESIGNATING OFFICERS TO TAKE TESTIMONY

- (1) employed devices, schemes, or artifices to defraud;
- (2) obtained money or property by means of, or otherwise may have made, untrue statements of material fact, or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

- (3) engaged in transactions, acts, practices, or courses of business which have operated as a fraud or deceit upon purchasers of securities or upon other persons.

In connection with the foregoing activities, such persons or entities may have, directly or indirectly, among other things, made false or misleading statements of material fact and/or failed to disclose material facts about the NAV that was the basis of the price at which mutual fund shares would be bought and redeemed and about the mutual funds' policies and procedures to prevent the adverse effects of market timers. Furthermore, certain persons or entities may have bought or sold securities on the basis of material, nonpublic information concerning mutual fund portfolios obtained in breach of a fiduciary or other duty not to disclose the information.

- C. Certain persons or entities, while acting as investment advisers or as associated persons of investment advisers, may have, directly or indirectly:
  1. employed or may be employing devices, schemes, or artifices to defraud clients or prospective clients; or
  2. engaged or may be engaging in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon clients or prospective clients.

In connection with the foregoing activities, such persons or entities may have permitted customers to engage in late trading and market timing in breach of their fiduciary duties and in contravention of certain funds' policies, procedures, and public disclosures.

D. Certain persons or entities, while acting as brokers or dealers, may have effected, or induced or attempted to induce, the purchase or sale of securities otherwise than on a national securities exchange of which such broker or dealer is a member by means of manipulative, deceptive, or other fraudulent devices or contrivances.

E. Certain persons or entities, while acting as registered investment advisers, brokers or dealers, or persons associated therewith, may have failed to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information by such investment advisers or brokers or dealers or persons associated therewith.

F. Certain registered investment companies issuing redeemable securities, persons designated as authorized in the prospectuses of such registered investment companies to consummate transactions in such securities, principal underwriters of, and dealers in, such securities, and other persons and/or entities, may have sold, redeemed or repurchased such securities at a price other than based on the current net asset value of such securities next computed after receipt of tender of such securities for redemption or of an order to purchase or sell such securities. In connection with the foregoing activities, such entities and others may have permitted customers or aided and abetted others to engage in late trading.



G. Certain affiliated persons of, or principal underwriters for, registered investment companies, or affiliated persons of such person or principal underwriter, acting as principal, may have effected transactions in which such registered investment company is a joint or a joint and several participant with such person, principal underwriter, or affiliated person, in contravention of rules prescribed by the Commission.

H. Certain affiliated persons of, or principal underwriters for, registered investment companies, or affiliated persons of an investment adviser of, or principal underwriter for, a registered investment company, may have engaged in acts, practices, or courses of business in connection with the purchase or sale, directly or indirectly, by such person of any security held or to be acquired by such registered investment company in contravention of rules adopted by the Commission to define and prescribe means reasonably necessary to prevent, such acts, practices, or courses of business as are fraudulent, deceptive or manipulative.

I. Certain persons may have willfully destroyed, mutilated, or altered accounts, books, or other documents required to be preserved by registered investment companies.

J. Certain persons may have made untrue statements of a material fact or omitted to state facts necessary in order to prevent the statements made, in the light of the circumstances under which they were made, from being materially misleading in registration statements, applications, reports, accounts, records, or other document filed with the Commission or the keeping of which is required by registered investment companies.

K. Certain persons serving or acting as officers, directors, members of any advisory board, investment advisers, principal underwriters, or depositors to registered investment companies may have engaged, or may be about to engage, in acts or practices constituting a breach of fiduciary duty involving personal misconduct with respect to such investment companies.

L. Certain registered brokers or dealers, investment advisers, or persons associated therewith, may have failed reasonably to supervise, with a view to preventing violations of the provisions of the federal securities statutes, rules, and regulations, another person subject to their supervision who committed such a violation.

M. Certain registered brokers or dealers, investment advisers, or investment companies may have failed to make and keep and preserve books and records as the Commission prescribes as necessary.

N. While engaged in the conduct described in paragraphs I.A through I.M above, such persons and entities, directly or indirectly, made use of the means or instruments of transportation or communication in, or the instrumentalities of, interstate commerce, or of the mails.

## II.

The Commission, having considered the staff's report and deeming such acts, transactions, practices, transactions, and courses of business, if true, to be possible violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b), 15(c)(1)(A), 15(f) and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rules 10b-5, 17a-3 and 17a-4 thereunder, Sections 204, 204A, 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act"), and Rule 204-2 thereunder, and Sections 17(d), 17(j), 31(a), 34(a) and 34(b) of the Investment Company Act of 1940 ("Investment Company Act"), and Rules 17d-1, 17j-1, 22c-1, 31a-1, 31a-2 and 31a-3 thereunder, and possible breaches of fiduciary duty involving personal misconduct under Section 36(a) of the Investment Company Act, and possible failures to supervise under Section 15(b) of the Exchange Act and Section 203(e) of the Advisers Act, finds it necessary and appropriate and hereby:

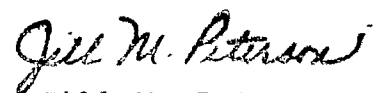
ORDERS, pursuant to the provisions of Section 20(a) of the Securities Act, Section 21(a) of the Exchange Act, Section 42(a) of the Investment Company Act, and Section 209(a) of the Advisers Act, that a private investigation be conducted to determine whether the aforesaid persons, or any other persons or entities, have engaged, are engaging, or are about to engage in any of the aforesaid acts, practices, transactions, or courses of business, or in any act, practice, transaction, or course of business of similar purport or object; and

FURTHER ORDERS, pursuant to the provisions of Section 19(c) of the Securities Act, Section 21(b) of the Exchange Act, Section 42(b) of the Investment Company Act and Section 209(b) of the Advisers Act, that for purposes of such investigation, Wayne M. Carlin, Edwin H. Nordlinger, Mark K. Schonfeld, Kay L. Lackey, Gerald A. Gross, James C. Gange, Justin W. Arnold, Craig Carpenito, William Finkel, Mona S. Akhtar, Peter A. Pizzani, Jr., John J. Graubard, Sheldon Mui, Elizabeth S. Goldman, Anthony T. Byrne, Daphna Abrams, Daniel Goldfried, Paul G. Gizzi, Carolyn L. Hiller, Jonathan A. Roberts, Bennett Ellenbogen, Shannon A. Keyes, Gerald Russello, James Farrell, Douglas Scarff, Joseph P. DiMaria, William J. Delmage, Raymond J. Slezak, Thomas C. Verderber, Kenneth O'Connor, Martin Towey, Robert A. Sollazzo, Linda A. Lettieri, Steven C. Vitulano, Ronald R. Krietzman, Doreen Rucci, Grzegorz A. Steckiewicz, Richard Needham, Juan Marcel Marcelino, David Bergers, Madeleine McGrath Blake, John Dugan, Martin Healey, Stuart Feldman, Bradford Ali, Risa King, Sandra Bailey, Beth Lehman, Jai K. Chandrasekhar, Corliss Primavera, Arthur Cabinet, Merri Jo Gillette, David Horowitz, Eustace Francis, Elizabeth Parker, Joy Thompson, William Meck, Mark Dowdell, Frank Thomas, Harold F. Degenhardt, Spencer C. Barasch, Jeff Cohen, Doug Gordimer, Joann Harris, Tom Keltner, David King, Jason Rose, Alan Buie, Robert Long, Adan Araujo, Carol Lowen, Mary E. Keefe, Robert J. Burson, Jane E. Jarcho, Paul A. Montoya, Kara M. Washington, David M. Cole, Carolann Gemski, David M. Dimitri, James A. Davidson, John J. Sikora, Kristen A. Harris, Peter B. Driscoll, Tracy W. Lo, Asheesh Goel, Kent W. McAllister, Jerome P. Tomas, Junaid A. Zubairi, Richard N. Rodelli, Scott J. Hlavacek, Francis J. Cuba, Donald A. Ryba, Evelyn T. Kendra, Luz M. Aguilar, R. Kevin Barrett, Jean M. Javorski, Delia L. Helpingstine, John E. Kustus, Randall Fons, Donald M. Hoerl, Amy J. Norwood, Jeffrey Lyons, Dale Coffin, Martha Fulford, Helane Morrison, Marc Fagel, Pauline Calande, Ivan Harris, Gary Klein, Christine Lynch, Edward McCutcheon, Randall Lee, Sandra Harris, Michele Layne, Lisa Gok, Kelly Bowers, Diana Tani, Lorraine Echavarria, Andrew Petillon, David Van

Havermaat, Martin Murphy, Victoria Levin, Finola Manvelian, Spencer Bendell, Marshall Sprung, Leslie Hakala, Janet Moser, Cindy Eson, Keri Axel, Jorge DeNeve, Catherine Whiting, Gina Saviola, Janet Moser, Cindy Wong, Michelle Royston, Gilroy Thomas, Mark Tseng, Eric Barker, Jonathan Ngo, Paula Weiser, Michael Levitt, Kevin Goodman, Charles Liao, Kent Ngo, and Harley Nelson be, and each of them hereby are, designated officers of the Commission and empowered to administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records deemed relevant or material to the inquiry, and to perform all other duties in connection therewith as prescribed by law.

By the Commission.

Jonathan G. Katz  
Secretary

  
By: Jill M. Peterson  
Assistant Secretary

# **Exhibit**

## **2**

**United States District Court  
District of Massachusetts (Boston)  
CIVIL DOCKET FOR CASE #: 1:03-cv-12154-NMG**

Securities and Exchange Commission v. Druffner et al  
Assigned to: Judge Nathaniel M. Gorton  
Case in other court: First Circuit, 07-02532  
Cause: 15:78m(a) Securities Exchange Act

Date Filed: 11/04/2003  
Jury Demand: Both  
Nature of Suit: 850 Securities/Commodities  
Jurisdiction: U.S. Government Plaintiff

**Plaintiff**

**Securities and Exchange Commission**

represented by **Beth Lehman**  
Securities and Exchange Commission - MA  
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06/08/2004	<u>40</u>	MOTION of Defendant Robert E. Shannon for Leave to File Reply to Opposition to Motion to Dismiss by Robert E. Shannon. (Attachments: # <u>1</u> Exhibit A, 1-3 NOT SCANNED)(Stanhope, Don) (Entered: 06/09/2004)
06/10/2004	<u>41</u>	NOTICE of Appearance by Sarah E. Walters, Robert L. Ullmann on behalf of John S. Pfeffer (Stanhope, Don) (Entered: 06/14/2004)
06/10/2004	<u>42</u>	Defendant Marc J. Bilotti's MOTION for Leave to File Reply to Opposition to Motion to Dismiss by Marc J. Bilotti.(Stanhope, Don) (Entered: 06/14/2004)
06/14/2004		Electronic Clerk's Notes for proceedings held before Judge Reginald C. Lindsay : Motion Hearing held on 6/14/2004 re <u>19</u> MOTION to Dismiss filed by John S. Pfeffer, <u>20</u> MOTION to Dismiss filed by Martin J. Druffner, Skifter Ajro, <u>14</u> MOTION to Dismiss filed by Marc J. Bilotti, <u>16</u> MOTION to Dismiss filed by Robert E. Shannon, <u>23</u> MOTION for Judgment on the Pleadings filed by Justin F. Ficken. Each motion was granted with leave given to the S.E.C. to re-plead within 30 days. (Court Reporter D. Joyce.) (RCL, law3) (Entered: 06/14/2004)
06/14/2004		Judge Reginald C. Lindsay : Electronic ORDER entered granting <u>40</u> MOTION of Defendant Robert E. Shannon for Leave to File Reply to Opposition to Motion to Dismiss, <u>42</u> Motion of Defendant Bilotti for Leave to File Reply to Opposition to Motion to Dismiss, <u>14</u> Motion to Dismiss by Defendant Bilotti, <u>16</u> Motion to Dismiss by Defendant Shannon <u>19</u> Motion to Dismiss by Defendant Pfeffer, <u>20</u> Motion to Dismiss by Defendants Druffner, Ajro, <u>23</u> Motion for Judgment on the Pleadings by Defendant Ficken. The S.E.C. has failed to comply with the requirements of Rule 9(b). The motions are granted with leave given to the S.E.C. to re-plead within 30 days. (RCL, law3) (Entered: 06/14/2004)
06/15/2004	<u>43</u>	Defendant Robert E. Shannon's Reply Memorandum of Law in Further Support of Motion to Dismiss filed by Robert E. Shannon. (Attachments: # <u>1</u> Exhibit 1-3 NOT SCANNED)(Stanhope, Don) (Entered: 06/15/2004)
06/15/2004	<u>44</u>	REPLY Memorandum in Support of Defendant Marc J. Bilotti's Motion to Dismiss filed by Marc J. Bilotti. (Stanhope, Don) (Entered: 06/15/2004)
06/24/2004	<u>45</u>	TRANSCRIPT of Hearing held on June 14, 2004 before Judge Lindsay. Court Reporter: Debra M. Joyce. The original transcripts are maintained in the case file in the Clerk's Office. Copies may be obtained by contacting the court reporter at 617/737-4410 or the Clerk's Office. (Scalfani, Deborah) (Entered: 06/24/2004)
06/24/2004	<u>46</u>	Notice of Reassignment. Judge Nathaniel M. Gorton added. Judge Reginald C. Lindsay no longer assigned to case. Counsel are directed to the Court's Standing Orders re: Electronic Case Filing. (Stanhope, Don) (Entered: 06/28/2004)
06/25/2004		Judge Reginald C. Lindsay : ORDER SEALED entered re <u>32</u> SEALED MOTION (Stanhope, Don) (Entered: 06/25/2004)
06/28/2004		Judge Reginald C. Lindsay : SEALED ORDER entered amending SEALED ORDER re <u>32</u> SEALED MOTION(RCL, law3) (Entered: 06/28/2004)
06/28/2004	<u>47</u>	Letter- regarding the Amended Complaint from Frank C. Huntington. (Stanhope, Don) (Entered: 06/30/2004)
07/14/2004	<u>48</u>	AMENDED COMPLAINT against Skifter Ajro, Marc J. Bilotti, Martin J. Druffner, Justin F. Ficken, John S. Pfeffer, Robert E. Shannon , filed by Securities and Exchange Commission. (Attachments: # <u>1</u> # <u>2</u> # <u>3</u> )(Nicewicz, Craig) (Entered: 07/16/2004)
07/20/2004	<u>49</u>	STIPULATION <i>To Extend Time for Defendants to Respond to Amended Complaint</i> by

# **Exhibit**

# **3**

**8/18/2005 O'Donnell, Christopher**

1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2

3 In the Matter of: )

4 ) File No. HO-10027-A

5 MORGAN STANLEY )

6 WITNESS: Christopher O'Donnell

7 PAGES: 1 through 226

8 PLACE: U.S. Securities and Exchange Commission

9 100 F Street, N.E.

10 Suite 1590, Room 8

11 Washington, D.C. 20549

12 DATE: Thursday, August 18, 2005

13

14 The above-entitled matter came on for hearing, pursuant  
15 to notice, at 10:05 a.m.

16

17

18

19

20

21

22

23

24 Diversified Reporting Services, Inc.

25 (301) 467-9200



# **Exhibit**

## **3A**

8/18/2005 O'Donnell, Christopher

1 phone call in March of '02?

2 A Yes.

3 Q When was the first time you guys met?

4 A I'd say probably not that far thereafter.

5 Probably, you know, it was within the next two weeks.

6 Q Was that meeting at your offices?

7 A No. We actually met at the New York Athletic Club.

8 Q And who was present at that meeting?

9 A Just Scott Murray, myself, and Jay Doolan.

10 Q And what was explained at that meeting?

11 A Just that, you know, they were Millennium, and that  
12 they were willing to do business with us. And they wanted to  
13 know if we were going to be able to trade international  
14 funds.

15 Q Any other questions besides just trade  
16 international funds?

17 A Not that I recall.

18 Q And were you able to answer them right at that  
19 meeting?

20 A No.

21 Q What did you have to check?

22 A We had to check -- we still hadn't gotten full  
23 approval to do this at our firm yet, so we were waiting for  
24 all that to come through.

25 Q Who did you have to get approval from?

8/18/2005 O'Donnell, Christopher

1 A We had to get approval from the compliance side and  
2 the sales side.

3 Q Who was it in the compliance side that you were  
4 dealing with?

5 A Bob Palleschi.

6 Q Who was it in the sales side that you were dealing  
7 with?

8 A Pretty much everybody.

9 Q Who was --

10 A Okay. Well, Sal Samperi was my manager, Jim  
11 Gunther was the complex manager, Bill McMahon was the  
12 regional manager, Jeff Standard was his assistant, and Bruce  
13 Alonzo, who ran sales.

14 Q So before you took Millennium on, you had  
15 conversations with all of these people?

16 A Either I had the conversations or Sal had the  
17 conversations.

18 Q So can you tell me what did you explain to them as  
19 to what Millennium was looking to do?

20 MS. BRUNE: Why don't you start with Palleschi  
21 first, and then each of the others.

22 THE WITNESS: Okay. Should I start with Curry  
23 first?

24 MS. BRUNE: Can I interrupt? I think it's a little  
25 out of order, because they had already sought approval to do

8/18/2005 O'Donnell, Christopher

1 Q -- you would have gone to Sal Samperi, and he would  
2 have gone to Bruce Alonzo to find out if that was okay?

3 A No. He probably wouldn't have gone to -- if it was  
4 an institutional account, it would have gone at least to Bill  
5 McMahon.

6 Q Just because they wanted to employ quantitative  
7 strategy?

8 A That's how far that you had to -- to open up an  
9 institutional account, you had to get approval from the  
10 region.

11 Q Well, now you're telling me that, basically, to  
12 open any institutional account, independent of the strategy  
13 they're going to employ, you had to go that far. Is that  
14 what you're saying?

15 A Yeah, I just did say that.

16 MS. BEATTIE: He said that when you were out of the  
17 room.

18 THE WITNESS: Yeah.

19 BY MR. FIELDER:

20 Q Okay. I'm asking you what it was about a market  
21 timing strategy that required it to go all the way to Bruce  
22 Alonzo for approval.

23 A I don't know.

24 BY MR. VAN METER:

25 Q You had this second meeting with Millennium, and



8/18/2005 O'Donnell, Christopher

1 you had to go back to get clearance from Morgan Stanley.  
2 Talk to me about how it went up the flagpole in relation to  
3 Millennium.

4 A I mean, it would have been a similar thing. I came  
5 back, talked to Sal, said, "Okay, we have another account  
6 that's looking to do this." "Who are they?" "Millennium  
7 Partners." And, you know, then we would -- you know, I'd  
8 call Bob Palleschi, and then we'd go -- and we would have the  
9 same dialogue that we had previously, and then I would go --  
10 now, at this time, it isn't -- you know, once it's now been  
11 approved that they're going to allow us to do this, these  
12 accounts didn't have to go to Bruce Alonzo to be signed off  
13 on. They only had to go to Bill McMahon now to be approved.

14 Q Even for the very first Millennium account, did  
15 that have --

16 A Every account had to go -- I'm sorry.

17 Q The very first Millennium account, did that go to  
18 Bruce Alonzo?

19 A I don't know. I don't know the answer to that for  
20 sure. I don't know the answer to that for sure.

21 Q Was there any other further explanations given as  
22 to what Millennium would be doing? Or did anyone ask on the  
23 way up the flagpole if Millennium would be doing anything  
24 different from Tower Research, or anything we're not --

25 A No. We told them we were going to basically do the

8/18/2005 O'Donnell, Christopher

1 allowed 10 round trips a year or something like that. So,  
2 you know, as long as you abided by that rule, then, you know  
3 --

4 Q So Millennium bought this VA. At some point, Sal  
5 contacted Brian Keneely.

6 A No, no. Brian Keneely used to come into our office  
7 all the time.

8 Q Okay. Brian Keneely at some point said, "Yeah, we  
9 know that Millennium is in this VA. We don't have any  
10 problems with it."

11 A Well, before we opened the account, we got it all  
12 approved. Before we did anything in regard to anything, we  
13 made sure we told everybody everything. When I tell you  
14 that, I can't stress that enough. I mean, I really want you  
15 to understand that when I walk out the door here. We didn't  
16 do anything without everybody knowing exactly what we were  
17 doing. Okay?

18 Q When you say "we" got it approved --

19 A Sal and I.

20 Q Okay. And Sal and you talked to --

21 A Before we did any insurance business -- I mean,  
22 keep in mind I said to you earlier that I didn't -- my  
23 insurance license lapsed when I moved to New York, so I  
24 didn't have an insurance license. So I went out and took the  
25 exam and took this to do this.

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1 Now, I didn't do that until we had been through  
2 every level with the firm, once again. Bob Palleschi, you  
3 know, Tony Naccarelli, Bill McMahon, Jeff Standard, Bruce  
4 Alonzo. Again, had to go through that whole thing and get it  
5 approved all again, because now this was a different product.  
6 Am I boring you? I'm sorry.

7 Q No, no. So you and Sal talked to this Brian  
8 Keneely.

9 A Right.

10 Q And you told him -- what did you tell him?

11 A "We're going to do some market timing."

12 Q And he said okay, so long as you met certain  
13 criteria.

14 A Right.

15 Q And what were those criteria?

16 A The criteria was, again, you know, following the  
17 rules of those mutual funds. You know, how many times you  
18 could -- you know, I think that, actually, annuities versus -  
19 - so like if you went into the Allstate -- I'm just going to  
20 -- if you went into the Allstate, I think in the prospectus  
21 of Allstate versus even the mutual fund itself said you were  
22 allowed 12 round trips in the annuity product.

23 Q Allstate said you were allowed 12 round trips.

24 A Yeah. I'm highly certain. I'm not positive. I'm  
25 pretty sure that it made that statement, yeah.

# **Exhibit**

## **3B**



8/18/2005 O'Donnell, Christopher

1 A Right.

2 Q Were there any calls that were original? You know,  
3 first requests not to trade?

4 A No, not that I remember.

5 Q What was the response from Sal when these stop  
6 letters would come in?

7 A Call the mutual fund and see what they think.

8 Q Was there any other response other than call the  
9 mutual fund and find out what this is about?

10 A No. It started there.

11 Q Was there any time period where the letters  
12 increased in frequency?

13 A Not that I remember. I don't remember.

14 Q You're saying, you know, they started like May of  
15 2002? Was there any time, you know, later in 2002 or 2003  
16 where you recall getting, you know, maybe like more than one  
17 of these a day or anything like that?

18 A I don't remember.

19 Q As these block letters came in, would they ask for  
20 a specific account to stop trading?

21 A Not always. It could be the branch, it could be  
22 me, or it could be the account --

23 Q Did you ever tell these mutual fund companies that,  
24 you know, there's 30 or 40 accounts that are all Millennium?

25 A Sure. I mean, certainly, the mutual fund companies



8/18/2005 O'Donnell, Christopher

1 knew that.

2 Q You called and you told them?

3 A The wholesalers would know that.

4 Q Which wholesalers did you tell that to?

5 A MFS knew that. ING knew that.

6 Q Anyone else?

7 A AIM knew that.

8 Q Who at MFS did you say that to?

9 A I don't remember his name. John Scully, I think  
10 was his name.

11 Q Who at ING did you say that to?

12 MS. BRUNE: Wait. You're asking a question that is  
13 not accurate. He's saying who knew it. And then your  
14 question was who did you say it to. But I'm thinking that  
15 not all the conversations with the mutual funds were between  
16 Mr. O'Donnell personally.

17 BY MR. VAN METER:

18 Q Okay. Who from Morgan -- let's say either  
19 yourself, Cusano, Gaetano, anyone who would be involved. Who  
20 did you contact at these funds? I'm sorry. When I say  
21 "you," I mean anyone on your team, contacted these funds and  
22 tell them that these 30 or 40 accounts are all the same  
23 party?

24 A Wholesalers all came to our office all the time.

25 Q And who -- you said you did that for MFS.

8/18/2005 O'Donnell, Christopher

1 A Right.

2 Q Or someone on your team did that for MFS, ING, and  
3 AIM.

4 A Right.

5 Q You told me John Scully was the contact at MFS.

6 A Yeah. I'm trying to think of the guy's name at  
7 ING. I don't know the guy's name at AIM either. I don't  
8 remember their names. Most of these mutual funds, you know,  
9 any of the wholesalers that came to see us all knew exactly  
10 that it was Millennium.

11 Q How do you know that they knew?

12 A Because I don't think anybody viewed Millennium as  
13 a bad group at that point either.

14 Q When you say "at that point," what point is that?

15 A The time that you're referring to.

16 MS. BRUNE: Wait. But the question is how did the  
17 wholesalers know that it was Millennium that was --

18 THE WITNESS: Because we told them. We told them.

19 BY MR. VAN METER:

20 Q "We." You?

21 A Right. Me and Sal and Jay and David, right.

22 Q But you don't remember -- you told John Scully. Do  
23 you know who you told at ING?

24 A I don't remember his name. The wholesaler at ING.  
25 The wholesaler at AIM. The wholesaler at --

8/18/2005 O'Donnell, Christopher

1 Q And there's one wholesaler for all of Morgan  
2 Stanley?

3 A No. He would be the wholesaler for like a region.  
4 So the wholesaler could be the wholesaler for all of New  
5 York, and then Westchester County, and maybe up to Boston,  
6 something like that.

7 Q So there's one wholesaler for the region that would  
8 encompass your office.

9 A Right.

10 Q And there was one guy for ING and one guy for AIM.

11 A Right. He had an inside guy and an outside guy.

12 Q Do you remember if he told the inside guy or the  
13 outside guy.

14 A Both. Talked to them both.

15 MS. BRUNE: Are these the same guys or different  
16 guys from the ones who would bring the plaques congratulating  
17 your desk --

18 THE WITNESS: Oh, it was the same guys.

19 MS. BRUNE: -- congratulating your desk for the  
20 assets that you brought to their firm.

21 THE WITNESS: Right. Those are the same guys.

22 BY MR. VAN METER:

23 Q Did you ever tell -- sometimes, you know, as we're  
24 looking through these stop letters, they're usually signed by  
25 someone. Did you ever tell the person that signed the stop

8/18/2005 O'Donnell, Christopher

1 letter that all these different accounts were Millennium?

2 A I don't remember.

3 MS. BRUNE: Can we take a break?

4 MR. VAN METER: Yeah. Let's take a five-minute  
5 break. Off the record.

6 (A brief recess was taken.)

7 BY MR. VAN METER:

8 Q Back on the record at 3:00, August 18, 2005. Mr.  
9 O'Donnell, would you agree there were no substantive  
10 conversations while we were off the record?

11 A Yes.

12 Q Let me show you what's been --

13 MS. BEATTIE: I think there were questions  
14 outstanding.

15 THE WITNESS: Yeah. And I'll go -- in regard to --  
16 you asked me some questions in regard to these mutual funds,  
17 right? So Ira Cohen is a fellow that -- he was at AIM. Now,  
18 he wasn't a wholesaler, but he was -- you know, he's one of  
19 the guys you would see on these letters who later on you see  
20 was trying to make some kind of an arrangement with us. And  
21 those were all Millennium accounts.

22 BY MR. VAN METER:

23 Q I'm sorry. Could you give me the last name?

24 A Ira Cohen. Sorry.

25 Q C-o-h-e-n?

8/18/2005 O'Donnell, Christopher

1 A Yeah, I believe so.

2 Q Let me show you what's been previously marked as  
3 Exhibit 112. This is a block letter from American Century.  
4 It looks like there was an e-mail to you, as well as Betty  
5 Martinez and Sal Samperi. If you go down to the bottom, it  
6 says, "We sent a letter dated 7/3/02 and asked that you no  
7 longer do business with American Century due to excessive  
8 trading, yet we continue to see trades dated 7/16/02,  
9 7/24/02, and 8/01/02. We have placed the stop purchases in  
10 the two following bins."

11 So after the letter came on 7/3/02, were subsequent  
12 trades then placed on those dates that are cited there in the  
13 letter?

14 A That's what this would indicate, but I don't know  
15 that -- I don't know the answer to that.

16 Q Can you give me any background as to, you know,  
17 what happened when this letter came stating that there were  
18 subsequent trades after the block letter?

19 A I don't remember this specific block letter.

20 Q If you see this, it looks like Betty Martinez  
21 forwards it to Ken Curry, Jim Coscia, Tony Naccarelli, and  
22 Donna Ginsel. Did any of these people approach you about  
23 this situation?

24 A Well, not this particular situation, that I  
25 remember.

8/18/2005 O'Donnell, Christopher

1 this. So this wasn't -- I didn't have any part of that.

2 Q Did Tower Research ever get trades rejected for  
3 market timing?

4 A Sure.

5 Q And what would Tower Research instruct you to do  
6 after they got a trade rejected?

7 A Tower Research was -- I think it was similar to  
8 what Millennium did. But they were -- I'm trying to put this  
9 in a nice way. They were not as -- they didn't trade as  
10 frequently as Millennium did, so they didn't have the same  
11 issues that Millennium potentially did. Or as many stop  
12 letters, I should probably put it.

13 Q So when they did receive a stop letter, what would  
14 they instruct you to do?

15 A Well, we would -- again, if we got the stop letter,  
16 we'd have a dialogue with Sal, talk to him about it. I'd  
17 call the mutual fund to make sure that, you know, there  
18 wasn't a problem. We'd call them. And they would ask us to  
19 call the mutual fund back to have more dialogue to understand  
20 why, because they didn't feel like they were trading outside  
21 of the boundaries that were set forth by the mutual fund  
22 company.

23 Q And what ultimately happened with the trade?

24 A I mean, in some cases, you know, mutual funds would  
25 reinstate trades if they felt that was the case. And then



8/18/2005 O'Donnell, Christopher

1 if, you know, they didn't, then they would leave it. You  
2 know, it wouldn't be entered, or the rejection held.

3 Q You said before that Millennium would ask you to  
4 place the trade even after it was rejected. Did Tower  
5 Research ever ask you to do that?

6 MS. BEATTIE: I think the testimony was that  
7 sometimes.

8 BY MR. VAN METER:

9 Q Okay, sometimes. Sometimes Millennium would ask  
10 you to place the trade. Tower Research never did that?

11 A I'm not sure.

12 Q Let me just be sure about the Millennium situation.  
13 Would they ask you to place the trade in the same account  
14 that the original trade was placed, or did they ask you to  
15 place a trade in one of their other accounts?

16 A No. I mean, it could go either way. It could go  
17 either way.

18 Q When was the last time you opened an account for  
19 Millennium?

20 A I don't know the answer to that.

21 MR. VAN METER: Could you mark this as 630?

22 (SEC Exhibit No. 630 was marked for  
23 identification.)

24 THE WITNESS: You asked me a question here. Let me  
25 think about what you said here. You said would they ask you



# **Exhibit**

## **3C**

8/18/2005 O'Donnell, Christopher

1 account. You know, your joint of rights of -- you know.

2 Q Did you ask anyone at Millennium why they started  
3 getting involved in these variable annuities?

4 A We just viewed it more like, you know, more pools  
5 of assets.

6 BY MS. HARE:

7 Q Can I just clarify, did you just make the statement  
8 that the variable annuities were purchased in the wrap  
9 accounts?

10 A Yes. In the choice account. "Choice" was Morgan  
11 Stanley's term for wrap accounts. Like they have a different  
12 name at Merrill, a different name at Prudential. They called  
13 it choice accounts at -- and that was also the arrangement  
14 that they made us do at Morgan Stanley. Those annuities also  
15 at first had to be in choice accounts.

16 Q So that was a Morgan Stanley rule.

17 A Right, right.

18 Q It wasn't the choice of Millennium for you to put  
19 the variable annuity in a choice account.

20 A No, that wasn't their choice. But at the end of  
21 the day, that was beneficial to them. Because it was a wrap  
22 account, and they didn't have to pay -- they paid less money.

23 BY MR. VAN METER:

24 Q Let me show you what's been previously marked as  
25 Exhibit 524. This is a -- I see at the bottom, there's an e-



8/18/2005 O'Donnell, Christopher

1 mail from Paul Brandon to Sal Samperi saying, "Sal, as per  
2 from Paul, any new insurance business purchase for the  
3 premium of 750,000 or greater needs to be questioned to  
4 determine strategy suitability." It goes on to ask, "The FA  
5 described the strategy behind the purchase."

6 Leonard Schmidt replies to Paul Brandon saying,  
7 "Lenny, Bob Palleschi and I had a conference call at the  
8 branch regarding this transaction. The branch manager, Sal  
9 Samperi, indicated that this account did intend to market  
10 time within the annuity. The manager stated he contacted  
11 Allstate, and they were okay with this, as long as the branch  
12 met certain criteria. This account had a \$5 million wire  
13 transfer in 8902, and the manager indicated that the other 3  
14 million would also be allocated towards the preferred client  
15 VA also. Please indicate if insurance has any issues with  
16 this practice and if Allstate would agree to market timing.  
17 This FA is a major market timer of mutual funds. Please give  
18 me a call."

19 Is this -- I'm assuming, since this went to Sal  
20 Samperi, your branch manager, are they talking about a  
21 Millennium or a Tower Research investment in a variable  
22 annuity?

23 A I mean, I guess you could look back at the account  
24 and try to determine whether that's a Tower or Millennium  
25 account, right? I mean, so I --

8/18/2005 O'Donnell, Christopher

1 MS. BRUNE: Well, that's the --

2 THE WITNESS: Okay.

3 BY MR. VAN METER:

4 Q Well, what's your recollection?

5 A Well, that's probably my recollection. Probably.

6 Q Is that you placed the trade --

7 A I don't know for sure that this is a Millennium or  
8 Tower account, because it doesn't say the name on it. But --

9 Q Did Millennium buy an Allstate annuity for the  
10 purpose of market --

11 A Yes, yes. I don't know if this one, but they did  
12 buy -- sorry. I'm sorry.

13 Q Was there an agreement with Allstate that buying a  
14 variable annuity for market timing would be okay, as long as  
15 certain criteria were met?

16 A Yes.

17 Q Who did you have the agreement with? Who did  
18 Millennium have the agreement with?

19 A Well, Allstate itself. But our wholesaler was a  
20 Brian Keneely.

21 Q Did you negotiate this agreement?

22 A There didn't need to be an agreement. I mean, they  
23 didn't -- you know, they said to -- it wasn't an agreement.  
24 It was the same prospectus in a mutual fund that it would be  
25 for any, you know, mutual fund. So it's the same -- you're

1 allowed 10 round trips a year or something like that. So,  
2 you know, as long as you abided by that rule, then, you know  
3 --

4 Q So Millennium bought this VA. At some point, Sal  
5 contacted Brian Keneely.

6 A No, no. Brian Keneely used to come into our office  
7 all the time.

8 Q Okay. Brian Keneely at some point said, "Yeah, we  
9 know that Millennium is in this VA. We don't have any  
10 problems with it."

11 A Well, before we opened the account, we got it all  
12 approved. Before we did anything in regard to anything, we  
13 made sure we told everybody everything. When I tell you  
14 that, I can't stress that enough. I mean, I really want you  
15 to understand that when I walk out the door here. We didn't  
16 do anything without everybody knowing exactly what we were  
17 doing. Okay?

18 Q When you say "we" got it approved --

19 A Sal and I.

20 Q Okay. And Sal and you talked to --

21 A Before we did any insurance business -- I mean,  
22 keep in mind I said to you earlier that I didn't -- my  
23 insurance license lapsed when I moved to New York, so I  
24 didn't have an insurance license. So I went out and took the  
25 exam and took this to do this.

# **Exhibit**

## **3D**

8/18/2005 O'Donnell, Christopher

1 MS. BRUNE: Chris, you've got to testify about what  
2 you know about, not what you're speculating about.

3 THE WITNESS: All right. Okay.

4 MR. VAN METER: I'm sorry. Do you want to finish?

5 MS. BRUNE: What's the question again? I'm sorry.

6 BY MR. VAN METER:

7 Q The question was although you had already ran up  
8 the flagpole with the general idea of what Millennium was  
9 going to do, you had said certainly Sal Samperi and, to your  
10 knowledge, Bill McMahon, approved each individual account.  
11 Did either Sal or Bill McMahon ask any more questions about  
12 what the purposes were of these accounts?

13 A When we were opening the accounts, he would ask,  
14 you know, "Is this a Millennium account?" You know, "Are we  
15 going to do the same thing?"

16 Q And you gave -- was that the only question asked,  
17 was this a Millennium account?

18 A "Is this a Millennium account? Is this the same  
19 thing? Are we going to do market timing?"

20 Q And there were no other questions other than that?

21 A Not that I can recall.

22 Q Within Morgan Stanley systems, was there anything  
23 that would automatically notify Morgan Stanley that these,  
24 you know, 30 to 40 accounts are all just Millennium?

25 A Well, I believe they had a system that would --



8/18/2005 O'Donnell, Christopher

1 that could notify -- I don't know for sure, though. But I'm  
2 pretty certain that you would know exactly who -- you know,  
3 it would be like if you had a family account. You had yours  
4 and your wife's account and your kids' accounts and an IRA  
5 account. It would all go under that.

6 BY MS. HARE:

7 Q Like a household account?

8 A Right, like a household type of thing. So you  
9 could see which -- you know, what accounts were -- I'm highly  
10 certain.

11 BY MR. VAN METER:

12 Q Do you know for a fact that all Millennium accounts  
13 were householded?

14 A No. I think householding is different than -- but  
15 I think they were all categorized as Millennium accounts.

16 Q But you said each time they would open an account,  
17 Sal would ask, "Is this a Millennium account," and you would  
18 say yes.

19 A Yeah.

20 Q So Sal knew --

21 A Yeah. I mean, Sal wasn't going to sign his name to  
22 anything unless he was a hundred percent sure on what it was.

23 Q So he knew all 40 of these accounts were --

24 A Oh, yes.

25 Q Did Bill McMahon know all 40 of these --



8/18/2005 O'Donnell, Christopher

1 A Yes.

2 Q Let me ask, between these different accounts, was  
3 money ever journaled between the accounts?

4 A Yeah, they would do that.

5 Q Why would they journal money between the accounts?

6 A Maybe there was -- again, I didn't do this. This  
7 was -- I didn't run operations. Dave Cusano and Jay Doolan  
8 did this. But money did -- no, I don't think they ever -- I  
9 think -- well, I'm not positive. I'm really not.

10 Q You said before that yeah, they did it?

11 A I don't think that they journaled money from this  
12 account. I don't think they ever did that. Actually, I  
13 don't think they did. I'm not positive, but I don't think  
14 they did.

15 Q Would there be journaling records at Morgan  
16 Stanley?

17 A Yeah.

18 Q And how would that work? Would you just compare  
19 account numbers and see --

20 A Yeah. You'd look at the account and see what -- I  
21 mean, just look at the activity page to see where -- what was  
22 journaled.

23 Q Did you ever have to look at these records to see  
24 if money was journaled?

25 A No, I didn't do that.

# **Exhibit**

# **4**

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NEW YORK STOCK EXCHANGE, INC.  
DIVISION OF ENFORCEMENT  
-----X

In the Matter of:  
  
MORGAN STANLEY DW, INC. and  
MORGAN STANLEY & COMPANY

Testimony of:  
  
SALVATORE SAMPERI

-----X  
  
14 Wall Street  
New York, New York  
  
July 26, 2005  
10:20 a.m.

A P P E A R A N C E S:

For the Division of Enforcement:

ROBERT K. BUTANI,  
Senior Principal Enforcement  
Investigator

MARIANNE PAOLI, ESQ.,  
Trial Counsel

CHUN LI,  
Litigation Analyst  
(a.m. session)

TRACY TIMBERS, ESQ.,  
Enforcement Director  
(a.m. session)

# **Exhibit**

## **4A**

93068.txt

2 this thing?

3 Some would say, unlimited. You can do as  
4 many turns that you want. The only control we will  
5 put on you is the size of the trade.

6 Q Was a record ever kept of those  
7 conversations?

8 A Between him and the mutual fund fund  
9 companies?

10 Q Yes.

11 A He may have kept them. I certainly did  
12 not.

13 Q There was no list kept of the number of  
14 turns in a particular mutual fund?

15 A No. He may have done that -- Doolan may  
16 have done that for his own benefit, so that when he  
17 got to the limit he would know what it was and he  
18 would stop.

19 It was his benefit to know that kind of  
20 stuff.

21 Q With respect to market timing you had  
22 spoken with your regional director, you had spoken  
23 with your branch office manager in White Plains.

24 Did you continue to have conversations --  
25 and you also had spoken with compliance.



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150

1 Samperi

2 A Right.

3 Q Did you continue to have conversations  
4 with those same individuals regarding O'Donnell's

93068.txt

5 market timing activity or market timing activity at  
6 your branch office?

7 A Yes.

8 Q Could you tell me what those issues  
9 were? If you could do it in a chronological order,  
10 if you can.

11 A The first stop letter we got was from  
12 American Century.

13 They, I think, first contacted external  
14 fund operations.

15 They in turn contacted Palleschi.

16 Palleschi sends me an e-mail and he  
17 copies McMahon.

18 I have a conversation with Palleschi. I  
19 have a conversation with McMahon.

20 That would be one example.

21 Q What are you informed of?

22 A Stay within the rules.

23 Q From each McMahon and Palleschi, they  
24 both reiterate that same information?

25 A Correct.

151

1 Samperi

2 Q Do you express any other concerns to them  
3 at that point?

4 A I said, look, our process is when this  
5 happens we stop. We are not going to do another  
6 trade in American Century. They don't want the  
7 business, we are not going to do it. And we didn't.

93068.txt

10 The capacity was -- it was 50 basis points.

11 I don't care what their capacity was.

12 Mine was 50 basis points.

13 50 basis points did not give you a lot of  
14 capacity into annuities. He was trying to get those  
15 annuities that were beyond what we were already  
16 into.

17 Q Using that same 50 basis point formula?

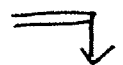
18 A Yes.

19 Q Why did you reject that idea  
20 automatically?

21 A I didn't reject it automatically.

22 I just said, we don't do anything until  
23 everybody approves it.

24 He called Pyndus and I called Pyndus and  
25 Palleschi and had conversations.



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205

1 Samperi

2 Q Was the first conversation between you  
3 and Pyndus or did Mr. O'Donnell reach out to  
4 Mr. Pyndus?

5 A I think O'Donnell spoke to him first and  
6 he spoke to Palleschi first.

7 Q Who was this client?

8 A I don't recall.

9 Q What was the amount of investment that he  
10 was proposing?

11 A I don't think he had a specific amount at  
12 that time.

93068.txt

13 Q You had a conversation first with  
14 Mr. Pyndus?

15 A Pyndus or Palleschi, one or the other.

16 Q What do you recall Mr. Pyndus saying to  
17 you?

18 A He wasn't entirely opposed to the idea  
19 but that he wanted us to do some basic research so  
20 he could evaluate it and he asked us if we would  
21 give him the single case exception companies that we  
22 thought we would like to get his approval on.

23 Q Did Mr. O'Donnell have a list of single  
24 case exception companies?

25 A Not at that time. He started doing some

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206

1 Samperi

2 homework.

3 Maybe he came up with, like, two or  
4 three.

5 Q Do you know what criteria Mr. O'Donnell  
6 used to depict those three, two or three?

7 A They had the biggest mutual fund menus in  
8 their annuity.

9 So it gave you a broader base to place  
10 the funds.

11 Q Did Mr. Pyndus express any concerns that  
12 he might have had with respect to this type of  
13 activity?

14 A His concern primarily was the single case  
15 exception issue.





93068.txt

16 As it turned out, I don't recall all the  
17 names but one of the companies was American  
18 Skandia.

19 John's objection to it was its credit  
20 rating.

21 He didn't want to put client money into  
22 an insurance company that had -- I forget what their  
23 credit rating was. It was well below what was  
24 required to have a sales agreement with Morgan  
25 Stanley.

207

1 Samperi

2 That was off the table.

3 Q What were the other two?

4 A I don't recall the names of the other  
5 two.

6 He had, I think, two out of the three he  
7 just outright dismissed based on credit ratings and  
8 the third one -- it was like borderline and he  
9 didn't want to make a decision.

10 We kind of bounced it back and forth.

11 Bob said, you need his okay.

12 John wanted to talk to Bob and finally it  
13 all headed towards a meeting we were going to have,  
14 all of us together.

15 I said, this is crazy, we are all on the  
16 telephone, let's sit down at a table and figure out  
17 if we were or were not going to do this.

18 Q Did you have such a meeting?

93068.txt

19 A Yes.  
20 Q When did you have that, do you recall?  
21 A October 10, 2002.  
22 Q Someone is prepared well.  
23 MR. MAYNARD: No comment.  
24 Q Or you have a very good memory.  
25 MR. MAYNARD: No comment.

208

1 Samperi  
2 THE WITNESS: I messed that one up.  
3 MS. PAOLI: I would like to show you --  
4 we are going back now to your notes which are in  
5 evidence as Exhibit 3.  
6 (Document handed to the witness.)  
7 If you could turn to page, what is Bates  
8 stamped ending in 13, which is page 13.  
9 A 9502?  
10 Q Yes. Go to line 4.  
11 A Yes.  
12 Q "Jackie Maz"?  
13 A The real name is Mazelli. "In branch.  
14 Told her of 5/29 plan from VK" Van Kampen. "Unable  
15 to be networked. No credit for office funds.  
16 Reviewed 9/30 asset based summary. Planning for  
17 Westchester Hills Golf Club -- asset based --"  
18 excuse me, "asset based submit. Planning for  
19 Westchester Hills Golf Club. Working with O'Donnell  
20 on getting okay for market timing in annuities. No  
21 go until Pyndus hears from Palleschi."

93068.txt

5 Q Please continue reading.

6 What is the second path he was choosing?

7 A "Two, work something out with carriers

8 that makes it doable. without blowing up

9 subaccounts, ala Third Avenue."

10 Q Do you know what that means?

11 A Yes. He was referring to that Pacific

12 Growth fund we had discussed earlier.

13 Q Was that a single-case exception?

14 A No.

15 Q That was general market timing in

16 annuities that resulted...

17 A Yes.

18 Q Please continue reading.

19 A "will be okay on having us explore

20 program with insurance carriers. Keep him posted.

21 Some have particular sensitivities; EG muni life.

22 Suggested COD would follow-up to describe on a list

23 of six carriers or so --"

24 MR. MAYNARD: Decide or describe?

25 THE WITNESS: Describe. Or decide. Hold

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214

1 Samperi

2 on. I am not sure.

3 I think it was -- it looks like decide.

4 It could be describe.

5 In any event, O'Donnell was going to work

6 up a list of carriers that he, Pyndus, clears and we

7 can have further conversations within the carriers.





93068.txt

11 Q Let's go to page 15 of Exhibit 3?

12 A Yes.

13 Q The lines 1 through 4 refer to the

14 meeting.

15 what about lines 5 through 14?

16 A That was something to do with the

17 Bloomberg machine.

18 Q Line 4 it says, "John Pyndus never..."

19 A Showed.

20 Q What do you have after that?

21 A "(See notes)".

22 Q Turning to page 57 of Exhibit 3?

23 A Yes.

24 Q Are those the notes that you referred to?

25 A Correct.

216

1 Samperi

2 Q If you could read that second paragraph,

3 which is the body of your notes.

4 Could you read that to me because I

5 cannot make out anything?

6 A I will read it from the top.

7 "Meeting New York City compliance office

8 Bob Palleschi, Tony Naccarelli, Paul --

9 Q You can skip down where it says

10 "remind."

11 A "Reviewed current status of mutual fund

12 trading activity, 50 beeps is working. Good control

13 limit. Number of turns when specified also adds the

93068.txt

14 control. Bob reiterates what we are doing is not in  
15 violation of regs. Stay within the rules. Believes  
16 this is a mutual fund issue. Said to hold off on  
17 external VAs until JP gives okay. Attempted to call  
18 him but no response. JP is only one who can sign  
19 off on single exception external annuities. Will  
20 follow up with JP."

21 Q What is your understanding of what  
22 Mr. Palleschi meant when he said, "this is a mutual  
23 fund issue."

24 A That encapsulates his feeling any time  
25 the mutual funds wanted to shut down this activity

217

1 Samperi  
2 they could. It was well within their power to do  
3 so.

4 Q Did Mr. Palleschi ever make any type of  
5 representation that the funds should be made aware  
6 of all of the FA numbers associated with a  
7 particular FA?

8 A Should we be proactive and just give it  
9 to them?

10 Q Correct.

11 A Not that I recall.

12 Q What about all of the account numbers  
13 associated with a particular customer?

14 A I don't understand the question.

15 Q You will have a customer who can have  
16 more than one account, correct?

93068.txt

8                   It could be just the fund that they were  
9   stopping, not the account.

10           Q     You don't know?

11           A     I don't.

12           Q     You received this document?

13           A     Yes.

14           Q     How did you address the AIM matter?

15           A     Stop it.

16           Q     Did you investigate this any further to  
17   see what was going in this case, that you recall?

18           A     Not that I recall.

19                   MS. PAOLI: Let's take a five-minute  
20   break.

21                   (Recess taken.)

22                   MS. PAOLI: Back on the record.

23   Mr. Samperi, there were no substantive discussions  
24   while we were off the record; is that correct?

25                   THE WITNESS: That is correct.

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1                   Samperi

2           Q     I believe we had discussed earlier  
3   American Century.

4           A     Yes.

5           Q     As December came along did you ever have  
6   any discussions -- let me ask you this. Who is Sam  
7   Turvey?

8           A     Director of compliance.

9           Q     He was the director of compliance from  
10   September through December of 2002?



93068.txt

- 11 A I don't know when he came on board.  
12 Q Was he there in November and December of  
13 2002?  
14 A Yes. Around that time. It was the end  
15 of 2002 he came on board.  
16 Q Did you ever have any discussions with  
17 Sam Turvey regarding market timing?  
18 A Yes.  
19 Q When did that occur?  
20 A In March prior to the release of the  
21 policy statement.  
22 Q In March?  
23 A Yes.  
24 Q Where did that conversation take place?  
25 A In his conference room.

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- 1 Samperi  
2 Q Who was present?  
3 A Myself, Chris O'Donnell, James Doolan,  
4 Sam Turvey, Bob Palleschi.  
5 I believe that was who was there.  
6 Q At whose request was this meeting taking  
7 place?  
8 A I think it was O'Donnell called Turvey  
9 but... I just don't recall who the spearhead was  
10 for the meeting.  
11 O'Donnell and Turvey had a conversation,  
12 let's get together and hash it out.  
13 Q Prior to this meeting, were there any

=



# **Exhibit**

## **4B**

93068.txt

85

1 Samperi

2 rules of the mutual funds were?

3 A Well, for instance, they would  
4 specifically say in a 12-month period of time you  
5 could have so many buys and sells.

6 Q Where did you learn that from?

7 A Either from the fund, the wholesaler, the  
8 prospectus.

9 There would be any number of sources.  
10 They would tell you themselves.

11 wholesalers would come into the branch  
12 all the time every day.

13 Q This information was relayed to you from  
14 Mr. Palleschi, I believe you had said to stay within  
15 the funds?

16 A To stay within the rules.

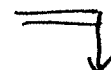
17 Q Did you pass that on to Mr. O'Donnell?

18 A Yes.

19 Q What did you personally do to find out  
20 what the rules were in the funds in which  
21 Mr. O'Donnell was employing this market timing  
22 strategy?

23 MR. MAYNARD: Initially or throughout?

24 This has turned into a kind of a  
25 longer --



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1 Samperi

2 93068.txt  
MS. PAOLI: No. Initially.

3 A My biggest source of information were the  
4 wholesalers from the mutual funds.

5 They would come into the office. I would  
6 sit them down in my office and I would say, make me  
7 smart about this.

8 , what are the trigger points? What do you  
9 guys don't want, what can we do, what can't we do?

10 They would tell us what the situation  
11 was.

12 Q The wholesalers worked directly for the  
13 mutual funds?

14 A Yes.

15 Q They were based in the mutual funds'  
16 offices?

17 A They would be wholesalers. They would  
18 make the round of the branches, visit us, try to get  
19 us to sell their funds.

20 They would put a presentation on about a  
21 particular fund.

22 Q When Mr. O'Donnell brought that idea to  
23 you and then you asked Mr. Gunther and then you  
24 asked Mr. McMahon, there came a time when  
25 Mr. Palleschi became involved also, correct?

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1 Samperi

2 A Correct, yes.

3 Q That was early on, also?

4 A Yes.

93068.txt

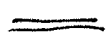
13 A Summer of 2002.  
14 Q Late summer?  
15 A I don't know.  
16 Q Summer?  
17 A I would say summer. July.  
18 Q What prompted you to place this amount  
19 control?  
20 A Two things. The wholesalers said the too  
21 sensitivities on the fund size was the amount of the  
22 trade and the number of turns.  
23 In terms of the amount, trying to figure  
24 out where is this amount that the funds would not be  
25 sensitive to, discussion with the wholesalers,



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1 Samperi  
2 wholesalers' discussion with fund people getting  
3 back to me, it was like a consensus that if you did  
4 your trades at 50 basis points at the fund value,  
5 you are going to be okay.  
6 That was a reasonable standard to adopt,  
7 preclude funds from being disrupted or having a  
8 negative impact by doing those kind of trades.  
9 Q Did you monitor or did you review  
10 anything to determine whether or not Mr. O'Donnell  
11 was complying --  
12 A Yes.  
13 Q -- with your 50 basis points control?  
14 A Yes.  
15 Q What did you do?



93068.txt

10 exchanges that was permitted with that particular  
11 mutual fund?

12 A At the beginning I just referenced them  
13 to see what was in there.

14 I came away with the sense that they were  
15 like fingerprints.

16 Every mutual fund had different language  
17 in their prospectus to govern this.

18 Some I couldn't even find it, other than  
19 a general phrase, "we reserve the right to reject  
20 any transaction that we feel is not in the best  
21 interest of the firm."

22 But some had very specific. 12 turns in  
23 12 months. Six in six months or something like  
24 that.

25 Q Do you know whether or not Mr. O'Donnell

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1 Samperi

2 or any of the sales assistants or FAs who were  
3 engaging in this type of business with him reviewed  
4 prospectuses to determine what their limit was?

5 A I don't know if it was so much reviewing  
6 prospectuses as getting the information from the  
7 wholesalers or funds themselves about what they  
8 would permit.

9 Q Was a list ever kept?

10 A Not that I can recall.

11 Q I understand that you would speak with  
12 some of the wholesalers or you might have reviewed



93068.txt

13 some of the prospectuses but did you do anything to  
14 determine whether or not Mr. O'Donnell had reviewed  
15 anything or spoken with anyone to know what his  
16 limits were in a fund in which he was about to  
17 engage in market timing?

18 A Yes, he did.

19 Q How do you know?

20 A He told me and the people he spoke to  
21 would speak to me sometimes.

22 Q There was no sort of review mechanism  
23 that you had in place that you could -- he would  
24 give you a number and you could check it?

25 A If you told me, Templeton Fund, I

0

143

1 Samperi  
2 couldn't tell you what the terms were, or something  
3 like that.

4 Like I said earlier, there was not a  
5 standard statement in mutual fund prospectuses that  
6 you could point to. All over the lot.

7 Q Each prospectus was different?

8 A Yes.

9 Q For each fund?

10 A Yes.

11 Q Some might have similar language or might  
12 have the same number of turns, as you described it?

13 A Yes.

14 Q But others would be different, correct?

15 A Yes.

# **Exhibit**

## **4C**

1 Samperi

2 A Yes. We just reviewed it in my  
3 Daytimer.

4 Q And then it goes on "Lenny, Bob Palleschi  
5 and I had a conference call with the branch  
6 regarding this transaction. The branch manager, Sal  
7 Samperi indicated that this account did intend to  
8 market time within the annuity. The manager stated  
9 he contacted Allstate and they were okay with this  
10 as long as the branch met certain criteria."

11 Is that all true what I have just read  
12 within the body of that paragraph?

13 A Yes.

14 Q You contacted Allstate? When they refer  
15 to the manager, they are referring to you?

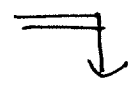
16 A Yes.

17 Q You were allowed to market time within  
18 the annuity as long as you met certain criteria.

19 What was that criteria?

20 A It was the controls that we had spoken  
21 about earlier with respect to the size of the trades  
22 and how they would conduct themselves with respect  
23 to moving money back and forth within the  
24 subaccounts, and the turns and things like that.

25 Q When you say the turns, did you discuss



1 Samperi



93068.txt

2 with Allstate specifically that you would be  
3 executing a certain number of turns?

4 A According to their policy. Whatever  
5 their policy was as stated would be our guideline.

6 Q The amount invested would be not greater  
7 than 50 basis points?

8 A Of the subaccount.

9 Q Who did you speak to at Allstate, do you  
10 recall?

11 A It was the wholesaler for Allstate. At  
12 the time they were called Northbrook.

13 Brian somebody. I don't recall his last  
14 name.

15 Q Did you ever speak with portfolio  
16 managers?

17 A No.

18 Q Any particular reason why not?

19 A The wholesaler in most cases would be the  
20 ones that would interact with the portfolio  
21 managers.

22 Q Do you know whether the wholesalers were  
23 communicating with the portfolio managers?

24 A Yes.

25 Q That was represented to you?

0

192

1 Samperi

2 A Yes.

3 Q With respect to this instance, the

4 Allstate matter that is referred to in this e-mail,

93068.txt

5 do you know whether or not this particular  
6 wholesaler communicated with the portfolio manager?

7 A Yes. He was very specific about that.

8 Q What was the name of the wholesaler that  
9 you had spoken with?

10 A I don't recall his last name.

11 His first name was, I believe, Brian.

12 Q Would he be the wholesaler for an entire  
13 region?

14 Could you describe how wholesalers, if  
15 you know --

16 A It varies. They are definitely given,  
17 not just the branch, but a large geographic area.

18 He might be responsible for Westchester,  
19 southern Connecticut, Rockland County, parts of  
20 northern New Jersey.

21 I don't know what his area was but it was  
22 typically a number of branches within a kind of  
23 contiguous geographic area.

24 Q Let's take a look at the next sentence.

25 "This account had a \$5 million wire

==

0

193

1 Samperi  
2 transfer on August 9 of '02 and the manager  
3 indicated that the other 3 million will also be  
4 allocated towards the preferred client VA also."

5 VA stands for variable annuity, I am  
6 assuming?

7 A That is correct.

# **Exhibit**

## **4D**

93068.txt

5 Q When you say early, you mean between what  
6 time frame?

7 A May, June, July.

8 Probably July was the biggest month.

9 MR. MAYNARD: 2002?

10 THE WITNESS: 2002, yes.

11 Q Let's talk about the types of complaints  
12 you would have received.

13 In what form would they come?

14 A The majority would be sent to external  
15 mutual fund operations by the external funds.

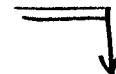
16 And then someone in external mutual fund  
17 operations would copy the branch.

18 Copy O'Donnell, copy me, copy both of  
19 us.

20 Q When did you first begin receiving -- was  
21 there a typical type of complaint that would be  
22 received by you from the --

23 A It would be categorized.

24 If I could categorize them for you, some  
25 of the complaints would say, we are canceling that



□

130

1 Samperi

2 trade. We don't want the trade.

3 They are not saying stop, they are just  
4 saying we don't want that trade.

5 Tomorrow they may take that fund. On  
6 that day for that fund, we are canceling the trade.

7 Some would say they would be warnings.

8                   You have already used ten of your 12  
9       turns for this year, you only have two left.  
10                  They tell us we had two left.  
11                  Some would be stop, we don't want your  
12       business. We are blocking you, Mr. O'Donnell, we  
13       don't want any trades from 723, 143. Boom, just  
14       stop.  
15                  Q     For you, personally, Mr. O'Donnell?  
16                  A     Yes. And they would list the numbers.  
17       The 143 and 743 and the partnerships.  
18                  Q     How would they have those numbers?  
19                  A     On the external mutual fund fund system.  
20       Or they would just ask for them. Some of the  
21       communications from the funds would have it right on  
22       their communication.  
23                  Q     It is your testimony that the mutual  
24       funds, the external mutual funds had the ability to  
25       see all of Mr. O'Donnell's -- or any FA number

D

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1                               Samperi  
2       associated with Mr. O'Donnell?  
3                  A     If they asked for it, yes.  
4                  Q     If they asked for it.  
5                  A     Yes.  
6                  Q     But they would not see it when the trade  
7       came in?  
8                  A     No. Let me take that back.  
9                        Yes, part of the trade is the  
10       identification number.

11 Q would the identification number also have  
12 the FA's name?

13 A It would depend. If they plugged them  
14 in.

15 Some of the funds they would not stop  
16 them at first, but they said, who is this guy?

17 And they would get the chapter and verse  
18 on his numbers, his name.

19 When they did stop him, they knew exactly  
20 who they were going to stop.

21 Q Initially, when a mutual fund would  
22 receive an order from the firm, an external mutual  
23 fund, do you have any sense or do you know what  
24 information they received in connection with that  
25 trade that identified the FA?

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132

1 Samperi

2 A I don't know.

3 I just don't know, Marianne -- when the  
4 FA puts the order in, he goes into that order entry  
5 system, his branch, the account, and his ID number  
6 are part of that order.

7 Any mutual fund out there, and I can tell  
8 you a number of them did it -- when they wanted to  
9 zero in on the broker, they simply said to external  
10 mutual fund operations, whose account is this.

11 The account would come back 143,  
12 O'Donnell.

13 Putting a block on 143 O'Donnell, no more

14 trades.

15 when the order entry system comes in,

16 743, 143, trade blocked.

17 BY MS. TIMBERS:

18 Q Do you know who in mutual fund operations  
19 provided those names to the mutual funds?

20 A It could have been any of the staff  
21 there -- Terry --

22 Q Stacy.

23 A Stacy, I am sorry. I remembered the T.

24 The head of the mutual fund operations is  
25 a guy named Ken Curry.

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133

1 Samperi

2 His backup was Betty Martinez.

3 There were, maybe, four or five other  
4 people that had day-to-day, daily hookups with  
5 mutual fund companies.

6 They definitely could have.

7 Many of them asked me.

8 They would call me up.

9 Who is this broker?

10 Chris O'Donnell.

11 What is his number?

12 Q Did Mr. O'Donnell have a problem with you  
13 giving out his name to the mutual funds?

14 A No. Some of the mutual funds would  
15 communicate with him directly. Wouldn't even copy  
16 me on it.

17 Q Do you know whether Mr. O'Donnell had a  
18 problem with anybody in mutual fund operations  
19 giving out his name?  
20 A No. It was part of the business, Tracy.  
21 It was part of the business from the  
22 standpoint that some mutual funds wanted the  
23 business and some didn't.  
24 There were some in between.  
25 They had half the foot in the door and a

0

134

1 Samperi  
2 half the foot out the door.  
3 Part of the learning process was to find  
4 out who would permit it, at what level and under  
5 what circumstances.  
6 The ones that didn't want it, stay away  
7 from them because they didn't want the business.  
8 We found out by putting in a trade.  
9 Boom, stop. We don't want your  
10 business.  
11 Q You are not aware of any instance where  
12 Mr. O'Donnell was not happy that his name was given  
13 out to a mutual fund?  
14 A It is common -- it is a fairly common  
15 practice that someone in the business wants to find  
16 out who did that trade.  
17 They could find out.  
18 I certainly could find out. Any mutual  
19 fund that is doing business with Morgan Stanley, you



20 call the external mutual fund operation.

21 We got some letters, the letters were  
22 addressed to Chris O'Donnell. They used his name  
23 frequently through a lot of these processes.

24 BY MS. PAOLI:

25 Q Were any mutual fund market timing trades

0

135

1 Samperi

2 placed under David Cusano's FA number?

3 A No. Any trade that he would have done  
4 could have only been put in through the joint  
5 production agreement.

6 Q But it would have a different ID number,  
7 the joint production agreement would have a  
8 different ID number than Chris O'Donnell's  
9 personal --

10 A Right. Chris O'Donnell was literally on  
11 every account. I would not allow him to hide his  
12 name anywhere.

13 Every joint production agreement has 143  
14 as part of the agreement.

15 Q David Cusano was not an FA but he was  
16 registered, right?

17 A Correct.

18 Q He was a sales assistant?

19 A Yes.

20 Q Do you know whether or not he was ever  
21 identified by American Century as a market timer, or  
22 having engaged in market timing business?

==

93068.txt

16 Q Indeed, there were instances in which  
17 Mr. O'Donnell received communication from, maybe not  
18 directly from the funds but through your mutual fund  
19 operation department in which he was notified that  
20 he had exceeded the number of turns in a particular  
21 fund?

22 A Correct. Or he might find out from the  
23 fund directly too.

24 Q In those instances, you were copied on  
25 those letters, correct?



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144

1 Samperi

2 A Sometimes.

3 Q When you learned that, would you have  
4 conversations with Chris O'Donnell about that?

5 A Yes.

6 Q What would you say to him?

7 A Tell him to stop. Look, you are out of  
8 turns. No more trades with this fund.

9 Q Did you determine whether or not he had  
10 reviewed the prospectus with respect to that  
11 particular fund to determine the number of turns he  
12 was permitted?

13 MR. MAYNARD: Is this a hypothetical  
14 question still?

15 MS. PAOLI: It is not a hypothetical.  
16 Mr. Samperi, I believe, you have already testified  
17 that you did receive letters.

18 THE WITNESS: Yes.  
Page 130

93068.txt

19 Q Saying that you have exceeded the number  
20 of trades, right?

21 A Correct.

22 Q It is not a hypothetical, you did receive  
23 those types of letters?

24 A Oh, yes.

25 Q What I want to know is, can you remember

□

145

1 Samperi

2 what you said to Mr. O'Donnell on those --

3 A Whenever we received a letter from a fund  
4 that told us to stop -- they didn't want any more  
5 trades, we had done too many or sometimes we didn't  
6 even reach their maximum number of turns, they were  
7 moving too fast.

8 No, we don't want that kind of business.  
9 Stop.

10 Whenever that occurred in any form of  
11 communication, I told O'Donnell to stop and he did,  
12 for the most part.

13 Sometimes he would ask another question  
14 but, Chris, stop. And he would stop.

15 Q Did you become concerned at all that  
16 Chris perhaps was not following your instructions  
17 for the controls that you had in place?

18 A No.

19 Q At any point in time.

20 A Every now and then it wasn't perfect.  
21 One would slip up.

# **Exhibit**

## **4E**

93068.txt

1 Samperi  
2 Q When was the last time you testified in  
3 connection with your former employer?  
4 A In 1995.  
5 Q Other than that, other than your  
6 testimony with the Port Authority?  
7 A No.  
8 Q I would like to now ask you some  
9 questions regarding your educational background.  
10 A Yes.  
11 Q Did you graduate from high school?  
12 A Yes.  
13 Q College?  
14 A Yes.  
15 Q What college did you go to?  
16 A Fordham.  
17 Q Did you graduate?  
18 A Yes.  
19 Q What degree did you receive?  
20 A BS.  
21 Q I am sorry?  
22 A Bachelor of science degree.  
23 Q Do you hold any other advanced degrees?  
24 A Yes.  
25 Q Could you please --



0

13

1 Samperi  
2 A New York University, MBA finance.  
3 Q You can continue if there are others.

93068.txt

4           A     No, that is it.  
5           Q     Do you hold any licenses or  
6     certifications?  
7           A     In connection with my current employment,  
8     yes.  
9           Q     Could you describe those?  
10          A     Series 7, Series 8, 63, 65, 31 and life  
11     insurance for life and health.  
12          Q     Are all of those licenses current?  
13          A     Yes.  
14          Q     I would like to now go through your  
15     employment history.  
16                 You had just described to me that you had  
17     worked with the Port Authority as a deputy director  
18     of public safety, in the public safety department.  
19                 How long were you in the employ of the  
20     Port Authority?  
21          A     30 years.  
22          Q     Could you just -- I want to go back to  
23     your education. When did you obtain your degree in  
24     finance?  
25          A     1969.

0

14

1                     Samperi  
2                     MR. MAYNARD: The MBA or the --  
3                     MS. PAOLI: The MBA in finance.  
4           Q     I believe you had a BS degree from  
5     Fordham?  
6           A     1962.

7 Q Did you retire from the Port Authority?  
8 A Yes.  
9 Q What did you do as the deputy director of  
10 public safety department?  
11 A I was the number two person in the Port  
12 Authority Police Department.  
13 Q What did you do? Did you handle any of  
14 the business activities or financing side --  
15 A Everything.  
16 Q You did everything?  
17 A Yes. I didn't go on patrol or  
18 investigate crimes but I supervised just about every  
19 unit there.  
20 The only one I did not supervise --  
21 Q What I am trying to find out is did you  
22 have any type of work experience with the Port  
23 Authority that related to finance at all?  
24 A Not really.  
25 MR. MAYNARD: Budgets and stuff.

0

15

1 Samperi  
2 THE WITNESS: Yes. Nothing in finance in  
3 terms of investments, if you want to categorize it  
4 as that.  
5 Q But you handled budgets?  
6 A Yes.  
7 Q You were there until 1995, 1995 you  
8 voluntarily retired?  
9 A Yes.

# **Exhibit**

# **5**



7/31/02

Prepared by:

Date: Wednesday

Verbal complaint - Mrs. Josephine Curran  
 against Michael Grebner (see notes) does not  
 want to go into details at this time - more  
 interested in transferring assets (put on  
 Older Fin Alert - Ed Jones cannot sell - go  
 through procedure to have it out back)  
 10:30 AM Train to NYC for Regina  
 Br Mgrs Conf at Shelburne 37<sup>th</sup> Lex  
 Dinner with CP - AB - PR at Montauk  
 Discussion with Bill McM - Jeff S -  
 Jackie Maggill on VE funds  
 for MTM access - OK - Ben is stuck  
 on MS Funds. Can do annuities for mtg  
 funds even though MS funds are under as sub  
 accounts - H-NB (Kelske) etc. must follow  
 Aff Funds - 4 mos. good - be sure to stay within  
 rules. Check with CFC - when done.  
 Relate to signing agreement with sub-pools.

Annual CPL Audit - CE Meeting at 4:15 PM.

daily  
messy

target:  
1354.4% down  
WSPRA CORP.

8/12/02

Prepared by: 1304

Date: Monday

- 10 AM ☒ E-Mail from Bill McMahon - call him on Bob P
- ☒ e-mail from Friday.
- ☒ Called Bill McM - someone in his office - Tracy -  
WCS
- ☐ Call to Chuck Patton - not available - WCS
- Rick Leong: CPL Auditor arrives Branch approx 0900 to conduct annual audit.
- Bob Trutta: Buy 50,000. FHL 4.25% '06 in 11440.
- Bill McMahon - briefed on American Century e-mail to stop mkt. timing transaction in their funds.
- Interaction with auditors all day - questions, requests for documents (e.g. McNear disbursement account approvals etc)
- John Palmer: Sell out entire account on Tom Lowell (checks not passed - down to 7% equity). Tom claims foul-up with transferring funds - instructed Tom to sell out account - sold Checkpoint Software - could NOT sell Concord EFS (CEFT) E class (No Buy / No Sell) restriction on stock for employees - will probably be lifted tomorrow - Called John Palmer back & signed on restriction.
- ☐ Bob Poleschi + Paul Brandon on \$2mm annuity ticket dropped on Friday. Bob said that mkt. time from another office put Pacific Group (MS) into deficit situation - pool of funds

(2)

in annuity put-accounts smaller than funds  
 in general. But reviewed rules other fund families  
 however as to continue not timing business  
 described rules in general — said we  
 are sensitive to prospectus — size of fund  
 — no description or neg. impact — if they  
 object no good.

8/13/02

Prepared by: 1304

Date: Tuesday

0930 - Reg. Conf. Call - (See Notes)

Call from Bill McMahon / Jeff Stannard -

question on \$75mm in new external fund  
purchases for 8/1 - 8/3 at Rye Branch - NOT

Correct - probably reflects mis/outs of market

timing from order to Fund a fund to fund

new money into Branch for 8/1-9 Between 5-10mm.

- 5 of which is in an annuity. Going to

conf. call in 3 min on subject.

Call to Chuck Patton - (was)

Jacki Morzilli - John Pyndus - head of Insurance

newcomer that met firms in annuities - he went to

Allstate and said what's going on - Brian McNally

our wholesaler may be in trouble - (suspect

Paul Brennan - CFC Ins - may have given

Brian's name to Pyndus who in turn gave it

to Allstate since we said it was OK with

Allstate if we followed their rules. Mac

fell out from 3rd Ave firms on Pacific

Group. Jackie admits to hold off on doing

any investing with funds in annuity until

dust settles and clear picture emerges and don't

Call from George Murphy from Chris Amos

office - was on on conf. call with Bill

Jeff - reason for touching off. funds pay

150mm in reg or ext funds (3rd Ave + 1st

Co's share) Rye 75mm - how is that possible

explained how it could happen - M&amp;M to Fur

(2)

Counts as new buy, but not NEW assets, etc.  
 Gonheim brought on entire market timing  
 operation — referred him to Ken Curry for  
 mechanics of ext. fund reporting. Will call  
 if he needs additional info.

☐ Called Jeff Sturmd to debrief him (WCS)

☐ Called Chuck Patton — on the phone (WCS) #2.

total of 3 calls over past 2 days. no net call  
 Submitted Branch Along of Activities for  
 making goal of \$ 3.2 mm in Aff Funds in  
 4 mos — Aug — Nov. No revenue.

☐ Called WtGC (Kevin Burke) on Sep 30<sup>th</sup>  
 date — left v mail on tel.

Mary Goldstein — Sell Toyota Bond (+5000 profit) put  
 it into balanced fund — pred. bonds — BINBX.

Tuesday

Prepared by: 1301

Date: 9/10/02

1 Chuck Patton / Frank Rizzo on 2003 Budget.

2 First attempt to send to CP - Hacked - message  
3 Server is not available (0900+)

4 Second attempt at 0941 - successful - 2003

5 Budget at CP - will get back if any question

6 ☒ Reg. Conf Call 1100 - To Review JHS 200

7 Fin Adv Comp Plan. - prep for 9/12/02 4:15P

8 ~~Off~~ BUS TV briefing by Brad Adams on new  
9 subject10 John Pyndus - head of insurance - on doing

11 mkt. trading in extended annuities - said he

12 is going down two paths - one - CPL/INSL

13 to meet and discuss - two - work something

14 out with carriers that makes it double with

15 having-up sub accounts (all 3rd line) Will

16 be OK on having us explore program with

17 carriers - keeping portfolio - some have partner

18 companies (e.g. MetLife) Suggested CO'D

19 would follow up to decide on a list of 6

20 carriers or so that he clears and live can

21 have further communication with the carriers.

22 Mark Schiller - MSCDX - for Brian23 Search Mkt Bld - will send tomorrow

27



Thursday

Prepared by:

Date: 10/10/02

1/ Bob Pallareschi - meet 2PM - NYC - with  
 2/ CO'D to discuss mkt timing does and mkt  
 3/ - mkt timing 2D/1E. (Tony Buccelli, Paul  
 4/ ~~Buccelli~~ - John Pyndus never showed). (see notes  
 5/ E-Mails to Duke D'Ambrosio on Bloomberg acct  
 6/ close out for CO'D - billed us for 4 months of time  
 7/ fee (4/02) at 1400 + a mg and 8000 + for  
 8/ close out when it should have been, according to  
 9/ Bloomberg & MS estimate - half the amount about 4000  
 10/ ALSO - my e-mail of 8/26 to DD'A said  
 11/ DO NOT PAY BILL UNTIL RESOLVED. -  
 12/ However, they still want to book a paid ct. A  
 13/ series of e-mails today attempting to rectify. No  
 14/ jump tomorrow.

chrs. Amts.	in PAs	Thursday	Prepared by: 1289
			Date: 10/31/02
1		FA Meeting 0830	
2		① Reg. Conf. Call (discussion on fut y Br-).	
3		② Holiday Party - 12/12/02 5 <sup>30</sup> -8 <sup>30</sup> WCC.	
4		conjunction with Wh. Pls Br.	
5		③ New RMD "unified" Title for calc. RMDs.	
6		④ Ret. Plan notification on new max amounts.	
7		⑤ Ret. Structures.	
8		Call to Bill O' Meara on new account for	
9		Exmoor LTD c/o Millennium Partners LLC.	
10		OK to approve - Millennium - hedge fund - does	
11		frequently - had the issue brought up before - it's	
12		(12316).	
13		Ida May on RMD - will send form - calc. and	
14		form for RMD unified title	
15		Dick Moore - Sell 1900 QQQ, 500 CSCO - process	
16		with money market.	
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28			



(2) 1/15/03 cont.

personality conflict with new BM (Carlos Villan) -  
basis for departure.

Briefed Ross LOP on background checks - said to  
e-mail Bill McMahon - update him on  
process and request OK to him. - SENT E/MAIL.

Bob Palladino on Chris Schuch account for  
COID on accessing N-Ed Michael Funds - did  
not have Bus Plan - e-mailed it to him -  
will review and get back - HOWEVER,  
he believes the whole issue of mkt + mns is a  
hot button item - policy comm set-up and meeting  
led to DWS. letter - more to come - attempt  
to develop Policy + definition - being driven by  
product types - **RECOMMENDS** - we hold off  
moving on Schuch model until we see  
what comes out of Policy Comm. - **AGREED** with  
Bob - briefed COID - we are on HOLD. - Signed Recs.

KENDREA

3/11/03  
Tuesday

Meeting with Sam Turvey, Bob Pallaschi, C'D, J. Doolan and myself at NYC CPC office to discuss C'D's MTM program - after reviewing the rebid ST made it very clear that a policy was going to be coming out shortly that would put a stop to this type of conduct. Only item that he would "think about" was the possibility of some form of transfer for C'D because of the impact on his earnings. But this was going to come. He promised to get back to us. Meeting ended on a good note.

# **Exhibit**

# **6**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :

v. : Civil No. 07-CV-11275 (JGK/JCF)

DARRYL A. GOLDSTEIN and :  
CHRISTOPHER L. O'DONNELL, :

Defendants. :  
-----X

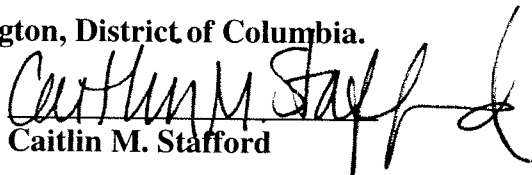
**DECLARATION OF CAITLIN M. STAFFORD IN SUPPORT OF DEFENDANT  
CHRISTOPHER L. O'DONNELL'S MOTION TO DISMISS**

**I, Caitlin M. Stafford, declare as follows:**

- 1. I am a legal assistant with the law firm of Mayer Brown LLP, counsel for Defendant Christopher L. O'Donnell.**
- 2. I submit this declaration in support of Defendant Christopher L. O'Donnell's Motion to Dismiss the Complaint.**
- 3. Attached hereto is a typed transcription, prepared by me, of handwritten notes of Salvatore Samperi.**
- 4. The attached transcription was prepared to the best of my ability.**

**I declare under penalty of perjury that the forgoing is true and correct.**

**Executed this 24th day of April, 2008, in Washington, District of Columbia.**

  
Caitlin M. Stafford

7/31/02 - Wednesday

Verbal complaint - Mrs. Josephine Caruso against Michael Gaetano (see notes) does not want to go into detail at this time - more interested in transferring assets (prob. with [O\_\_?\_\_ F\_\_?\_\_])  
Alert - Ed Jones cannot sell - give her procedures to have it sent back).

10:30 a.m. Train to NYC for Regional Br. Manager Conf. at Shelbourne 37th and Lexington.  
Dinner with CP, AB, FR at Morton's. Discussion with Bill McM - Jeff S. - and sep. - Jackie Mazzelli on VK funds for MTim. accts. - OK - ban is strictly on MS funds. Can do annuities for mkt. timing even though MS funds are [\_\_?\_\_] as sub accounts -- H - NB (Allstate) etc. [\_\_?\_\_].

Affil. funds - 4 month goal - be sure to stay within rules. Check with CPL - wholesaler. Relate to size of annuity sub-pools.

1304

8/12/02 – Monday

Annual CPL Audit – CE Meeting at 4:15pm

([? ] : 1354.40 close on NASDAQ comp.)

(\*\*In margin\*\*) Marty Massy Funeral 10AM

E-mail from Bill McMahon – call him on Bob P e-mail from Friday.

Called Bill McM – someone in his office – [T? ] WCB

Call to Chuck Patton – not available – WCB

Rick Leong: CPL Auditor arrived Branch apx. 0900 to conduct annual audit.

Bob Trotten: Buy 50,000 FHL 4.25%, '06 in [? ] 11440

Bill McMahon – briefed on American Century e-mail to stop mkt. timing transactions in their funds.

Interaction with auditor all day – questions, requests for documents (e.g. McNear discretionary account approvals, etc.)

John Palma: Sell out entire account or Tom [? ] Lowell (clocks not passed – down to 7% equity, Tom claims foul-up with transferring funds – instructed Tom to sell out account – sold Checkpoint Systems – could NOT sell Concord EFS (CEFT) E class (No Buy/ No Sell) restrictions on stk. For employees – will probably be [? ] tomorrow – called John Palma back & informed on restriction.

Bob Palleschi & Paul Brandon on \$2MM annuity ticket dropped on Friday. Bob related that mkt. timing from another office put Pacific Growth (MS) into deficit situation – pool of funds

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in annuity sub-accounts smaller than fund pool in general. Bob reviewed rules other fund families have given to us to continue mkt. timing business – discussed rules in general – said we were sensitive to prospectus – size of funds – no disruption or neg. impact – if they object no good.

1304

8/13/02 - Tuesday

0930 - Reg. Conf. Call - (see notes).

Call from Bill McMahon/Jeff Standard - question on \$75 MM in new external fund purchases from 8/1 - 8/9 at Rye Branch - NOT CORRECT - probably reflects ins/outs of market timers from MMKT to Fund and fund to fund . New money into Branch from 8/1 - 9 between 5-10M - 5 of which is in an annuity. Going to conf. call in 3 min. on subject.

Call to Chuck Patton - WCB

Jacki Mazzelli - John Pyndus - Head of Insurance nervous about market timers in annuities - he went to Allstate and said what's going on - Brian McNeely our wholesaler may be in trouble - (suspect Paul Brandon) - CPL INS - may have given Brian's name to Pyndus who in turn gave it to Allstate since we said it was OK with Allstate if we followed these rules. More fallout from 3rd Ave. fiasco in Pacific Growth. Jackie advises to hold off on doing any investing with funds in annuity until dust settles and clear picture emerges on do's and don't's.

Call from George Murphy from Chris Amo's office - was in on conf. call with Bill. Jeff - response for trading aff. funds [\_\_?\_] 150M in [\_\_?\_] on ext. funds (3rd Ave. and [\_\_?\_] Lions' shares) Rye 75MM - how is that possible explained how it could happen - MMKT to Fund.

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Counts as new buy, but not NEW assets, etc. Gave him background on entire market timing operation - referred him to Ken Curry for mechanics of ext. fund reporting. Will call if he needs additional info.

Called Jeff Standard to debrief him - WCB.

Called Chuck Patton - on the phone - WCB #2, total of 3 calls over past two days no ret. call.

Submitted Branch Plan of Activities for making goal of \$3.2m I Aff. Funds in 4 mos. - Aug - Nov. Ni received.

Called WHGC (Kevin Burke) on Sep. 30 date - left vmail on tel.

Mary Goldstein - Sell Toyota Brand (+ 5000 profit) put it into balanced fund - pred. bonds - BINBX.

1301

9/10/02 - Tuesday

Chuck Patton/Frank Rizzo on 2003 Budget. First attempt to send to CP - blocked - message services not avail. (0900 +).

Second attempt at 0941 - successful - 2003 Budget at CP - will get back if any questions.

Regional Conference Call 1100 - TO REVIEW IAS 200 FIN. ADV. COMP. PLAN - prep. for 9/12/02 4:15 p.m. BUS. TV. briefing by Bruce Alonzo on [?] subject.

John Pyndus - head of insurance - in doing mkt. timing in external annuities - said he is going down two paths - one - CPL/INS to meet and discuss - two-work something out with carriers that makes it doable without blowing - up sub accounts (ala 3rd Ave.). Will be OK on having us explore program with ins. carriers - keep him posted - some have particular sentiments (e.g. Manulife). Suggested CO'D would follow-up to describe on a list of 6 carriers or so that he clears and we can have further conversation with the carriers.

Mark Schiedler - MDCDX - for [J B?] [?] MMKT Bal. - will call tomorrow.



10/10/02 - Thursday

Bob Palleschi - meet 2 p.m. - NYC - with CO'D to discuss mkt. timing deals with m.fund and market times 20/IT. (Tony Naccarelli, Paul Brandon - John Pyndus never showed) (see notes).

Emails to Debra D'Ambrosio in Bloomberg acct. closed out for CO'D - billed us for 4 months after term (4/02) at 1400 + a mo. and 8000 + for close out when it should have been, according to Bloomberg + MS estimate - half the amt. about 4000. ALSO, my email of 8/26 to DD'A said DO NOT PAY BILL UNTIL RESOLVED. However, they still went ahead and paid it. A series of emails today attempting to rectify. [M\_\_\_?\_\_ \_\_\_?\_\_] tomorrow.

1289

10/31/02 - Thursday

(\*\*In margin\*\*) [?] amts. for FAs.

FA Meeting 0830

- 1) Reg. Conf. Call (discussion on [?] of Br.)
- 2) Holiday Party - 12/12/02 5:30-8:30 WCC. In conjunction with Wh. Pl. Br.
- 3) New RMD "unified" table for calc. RMDs.
- 4) Ret. Plan not [?] on new max. amounts
- 5) FA Brochures.

Call to Bill O'Meara on new account for Exmoor Ltd. c/o Millenium Partners LLC. OK to approve - Millenium a hedge fund - does frequently - had the issue brought up before its [?] (12316).

Ida May on RMD - will send form - calc. amt. from new RMD unified table.

Jack Mace - Sell 1900 QQQ, 500 CSCO - proceed with money market.

1/15/03 (page 2) cont'd

personality conflict with new BM (Carlos Viella) was basis for departure. Briefed Rob LOP on background checks - said to email Bill McMahon - update him on process and request OK to hire. - SENT EMAIL.

Bob Palleschi on Chas. Schwabb account for CO'D on accessing N-Ld. Mutual Funds - did not have Bus. Plan - e-mailed it to him - will review and get back - HOWEVER, he believes the whole issue of mkt. timers is a hot button item - policy comm. set-up and meeting led to Ins. letter - more to come - attempting to develop policy and definition - being driven by product types - RECOMMENDS - we hold off moving on Schwabb model until we see what comes out on Policy Comm. - AGREED with Bob - briefed CO'D - we are on HOLD - Informed RCO.

Kendrea

3/11/03 - Tuesday

Meeting with Sam Turvey, Bob Palleschi, C'OD, J. Doolan and myself at NYC Cpl. office to discuss CO'Ds M. Timing program – after reviewing the activity, ST made it very clear that a policy was going to be coming out shortly that would put a stop to this type of activity. Only item that he would “think about” was the possibility of some form of transition for CO'D because of the impact on his earnings that this was going to cause. He promised to get back to us. Meeting ended on a good note.